

United States
Court of Appeals
for the Ninth Circuit

MOTORES de MEXICALI, S. A., a corporation,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION and E. A. LYNCH,
Trustee of the Estate of Erbel, Inc., doing busi-
ness as Bi-Rite Auto Sales, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED
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PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERNEST R. UTLEY,
417 South Hill Street,
Los Angeles 13, California.

For Appellee Bank of America National Trust
and Savings Association:

HUGO A. STEINMEYER,
ROBERT H. FABIAN,
ROBERT VAN BUSKIRK,
650 South Spring Street,
Los Angeles 14, California.

For Appellee E. A. Lynch, Trustee:

CRAIG, WELLER & LAUGHARN,
817, 111 West Seventh Street,
Los Angeles 14, California.

[1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy—No. 57280-WB

In the Matter of ERBEL, INC., dba. BI RITE AUTO SALES, Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the District Court of the United States for the Southern District of California:

The Petition of Erbel, Inc., dba Bi Rite Auto Sales, residing at No. 4950 W. Pico Blvd., in City of Los Angeles, County of Los Angeles, State of California, by occupation a used car dealer [or engaged in the business of Used Car Dealer].

Respectfully Represents:

1. Your petitioner has had its principal place of business at 4950 West Pico Blvd., within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule marked Schedule A will be filed within ten days.

4. The schedule marked Schedule B will be filed within ten days.

Wherefore Your Petitioner Prays, That it may

be adjudged by the court to be a bankrupt within the purview of said Act.

ERBEL, INC.,

/s/ DAVID COWAN, President
Petitioner

QUITTNER & STUTMAN,

/s/ By JOLLY STUTMAN,
Attorney for Petitioner

United States of America,
Southern District of California,
County of Los Angeles—ss.

Oath For Corporation

I, David Cowan, President of Petitioner, do hereby make solemn oath that I am the President of the corporation which is the Petitioning Debtor mentioned in the foregoing petition and which corporation is duly organized under the laws of the State of California and engaged in the business of Used Cars and is not a municipal railroad, insurance nor banking corporation, and that I am duly authorized in the premises; that a copy of the vote or resolution authorizing the filing of this petition is attached hereto, made part hereof and marked Exhibit "C", and I do hereby make solemn oath that the statements contained in the above petition are true according to the best of my knowledge, information and belief.

/s/ DAVID COWAN,
Officer of Corporation

Subscribed and sworn to before me this 2nd day of July, A. D. 1953.

[Seal] /s/ SILVIA L. LAITZ,
Notary Public in and for said County and State. [2]

Exhibit "C"

Resolved, that the President of this Corporation be and he is hereby authorized and directed to execute such documents and to take such steps as may be necessary or required on behalf of the Corporation in connection with the filing of a voluntary petition in bankruptcy under the Bankruptcy Act, in the District Court of the United States, Southern District of California, Central Division.

Further Resolved, that the President of this Corporation be and he is hereby authorized and directed to retain Quittner and Stutman, attorneys, of Los Angeles, California, as counsel to represent the Corporation in the above proceedings.

The undersigned, Secretary of Erbel, Inc., does hereby certify that the foregoing is a full, true and correct copy of a resolution duly adopted at a special meeting of the Board of Directors of said corporation held on July 2, 1953, and that the same has not been revoked or rescinded, and is still in full force and effect.

[Seal] /s/ ERVIN G. RESNICK,
Secretary. [3]

[Endorsed]: Filed July 2, 1953.

[Title of District Court and Cause.]

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on July 2, 1953.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 57280-WB. Title of Proceedings: Erbel, Inc., dba Bi Rite Auto Sales. Filed 7/2/53. Referee: Hugh L. Dickson, Esq., Los Angeles, California.

HARRY C. WESTOVER,

United States District Judge [4]

[Endorsed]: Filed July 2, 1953.

[Title of District Court and Cause.]

PETITION TO RECLAIM PROPERTY

To Honorable Hugh L. Dickson, Referee in Bankruptcy:

Comes Now Bank of America National Trust and Savings Association, and respectfully represents:

I.

A petition in bankruptcy has been filed by the above-named bankrupt on July 2, 1953.

II.

At the time of the filing of the aforesaid petition in bankruptcy the bankrupt had in his possession certain motor vehicles more particularly described in columns one and two of Schedule "A" annexed hereto and had in his possession the proceeds of sale of seven (7) motor vehicles, more particularly described in columns one and two of Schedule "B" annexed hereto.

III.

That said motor vehicles hereinabove mentioned, and more particularly described in columns one and two of Schedule "A" [5] annexed hereto, are the property of petitioner herein; that said motor vehicles are included in and are the subject of certain trust receipt certificates made, executed and delivered by the bankrupt to petitioner on or about the dates shown in Column three of Schedule "A" annexed hereto.

IV.

That the balances owing petitioner under the said trust receipts set forth in Schedule "A" are in the sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00), which sum is the aggregate of the sums owing petitioner on the items listed in Columns One and Two of Schedule "A" annexed hereto; that the unpaid balances owing on each particular item of equipment listed in Columns One and Two of Schedule "A" annexed hereto are set forth in Column Four of Schedule "A" annexed hereto.

V.

That no part of said indebtedness has been paid by the bankrupt, and there is now due, owing and unpaid your petitioner thereon the sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00).

VI.

The said motor vehicles hereinabove mentioned and described in Columns One and Two of Schedule "B" annexed hereto were the property of petitioner herein; that said seven (7) motor vehicles are included in and are the subject of certain trust receipt certificates made, executed and delivered to petitioner by the bankrupt; and that while said seven (7) motor vehicles were in the possession of bankrupt, said seven (7) motor vehicles were sold and the proceeds of sale were not delivered or paid over to petitioner herein and that under said trust receipt certificates the bankrupt did agree to hold the automobiles and the [6] proceeds of sale thereof

in trust for your petitioner; that petitioner is informed and believes and therefore alleges that respondent now holds said proceeds of sale in trust for your petitioner and the balance of said proceeds now due your petitioner from said sale of said seven (7) motor vehicles is the sum of Six Thousand Nine Hundred Fifty-Nine Dollars (\$6,959.00) which sum is the aggregate of the sums owing petitioner on the items listed in Schedule "B" annexed hereto as more particularly set forth in Column Four of said schedule.

VII.

That E. A. Lynch has been appointed Trustee of the above bankrupt estate. That the aforesaid motor vehicles set forth in Schedule "A" annexed hereto and said proceeds of sale of motor vehicles described in Schedule "B" annexed hereto are in the possession of the said Trustee.

VIII.

That petitioner has on July 3, 1953, demanded of the said E. A. Lynch, Trustee, that he either abandon the said motor vehicles described in Schedule "A" annexed hereto to your petitioner or sell the same forthwith and pay the respective balances owing your petitioner under the aforesaid trust receipts and to deliver pay over to your petitioner herein out of the proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto the sum of Six Thousand Nine Hundred Fifty-Nine Dollars (\$6,959.00) but that the said E. A. Lynch, Trustee, has failed and refused and still

fails and refuses to either abandon the said motor vehicles described in Schedule "A" or to sell the same and pay off the said sum of Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00) owing to your petitioner as requested. Said Trustee has further failed and refused and still fails and refuses to deliver or pay over to petitioner out of [7] said proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto the sum of Six Thousand Nine Hundred and Fifty-Nine Dollars (\$6,959.00).

IX.

That the reasonable market value of said motor vehicles set forth in Columns One and Two of Schedule "A" annexed hereto, is less than Twenty-Three Thousand Three Hundred and Sixty-Three Dollars (\$23,363.00).

Wherefore, your petitioner prays:

1. That this Court determine that there is no equity in the aforesaid motor vehicles described in Schedule "A" annexed hereto for the bankrupt estate herein;

2. That the Trustee E. A. Lynch be authorized and directed to abandon said motor vehicles described in Schedule "A" annexed hereto to your petitioner;

3. That the Trustee E. A. Lynch be authorized and directed to deliver and pay over to your petitioner from the proceeds of sale of said motor vehicles described in Schedule "B" annexed hereto

the sum of Six Thousand Nine Hundred and Fifty-Nine Dollars (\$6,959.00).

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Petitioner Bank of America National
Trust and Savings Association. [8]

Schedule "A"

Description	Motor & License No.	Date 1953	Present Balance
1951 Pontiac CaCpChSu	Mot. No. P8UH62145 Lic. No. 1W60610	Jan. 5	\$1,179.00
1950 Merc. 6P CP	Mot. No. 50LA30465M Lic. No. 1W60734	Jan. 12	855.00
1952 Pontiac Sup Cata	Mot. No. P8WH5586 Lic. No. 1W29446	Feb. 25	1,435.50
1952 Lincoln Club Cosmo	Mot. No. 52LP5111H Lic. No. 1W29462	Feb. 25	1,921.50
1951 Pontiac Sup Cat	Mot. No. P8UH102812 Lic. No. 1W29453	Feb. 28	1,323.00
1952 Lincoln SpCpSpCa	Mot. No. 52LP17934H Lic. No. 1X816219	Mar. 10	2,400.00
1952 Pontiac 4 Dr Sd	Mot. No. P6WH-1499 Lic. No. 1X81637	Mar. 12	1,380.00
1950 Buick 8 Sup 4 Dr Dyn	Mot. No. 57791454 Lic. No. 8R2109	Mar. 25	1,125.00
1951 Chev. Fl Dlx 4 Dr	Mot. No. JAD921334 Lic. No. 1X32664	Mar. 31	975.00
1951 Buick 48D-2 Dr Dyno	Mot. No. 65129114 Lic. No. 1X32661	Apr. 6	1,200.00
1950 Olds 8 98Dlx 4 Dr Hydro	Mot. No. 8A357041H Lic. No. 1X32666	Apr. 8	1,137.00
1949 Cad. 60 Fleetwood Hydr	Mot. No. 4960-01843 Lic. No. 1V35730	Apr. 13	1,472.00
1950 Buick 56R Riv Dyno	Mot. No. 58814695 Lic. No. 1X32656	Apr. 14	1,237.00

Description	Motor & License No.	Date	Present Balance
1947 Olds 8 98 Conv Hydr	Mot. No. 8102960HS Lic. No. 1R65634	1953 Apr. 20	588.00
1949 Buick Rdmst Riv Cpe Dyno	Mot. No. 55256587 Lic. No. 1S55225	Apr. 24	1,012.00
1951 Buick Riv Sup Cpe Dyno	Mot. No. 65010995 Lic. No. 1W60040	Apr. 24	1,425.00
1947 Olds 8 98 Conv. Cpe Hydr	Mot. No. 883797HS Lic. No. 8N71691	May 18	562.00
1952 Chev SyDlx 4 Dr	Mot. No. KAA49792 Lic. No. 1Y97954	May 19	1,068.00
1952 Chev SyDlx 4 Dr	Mot. No. KAA14323 Lic. No. 1Y97952	May 19	1,068.00

23,363.00

Schedule "B"

Description	Motor and License No.	Date	Present Balance
1948 Lincoln SpSd9EL	Mot. No. 9EL5557 Lic. No. 6A41453	1953 Jan. 27	\$ 688.00*
1948 Hudson 6 Sup 4 Dr	Mot. No. 48123393 Lic. No. 3J2030	Apr. 20	525.00*
1948 Cad 62 Conv Hydr	Mot. No. 486238723 Lic. No. 1S67865	Apr. 29	1,237.00
1949 Pont. 8 Sl Dlx SdCp Hydr	Mot. No. C8RH5335 Lic. No. 1R44260	Apr. 29	877.00
1952 Buick Riv Sup Dyno	Mot. No. 66741345 Lic. No. 1Y61107	May 9	1,612.00
1950 Chev. Sty Dlx Clb Cpe	Mot. No. HAA702291 Lic. No. 1Y61111	May 9	798.00
1953 Pont. 6 Std 2 Dr	Mot. No. P6XS1570 Lic. No. 1Y97956	May 19	1,222.00*

\$6,959.00

* Marginal note in ink: Pd.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Bank of America National Trust & Savings Association, and Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, its attorneys. E. A. Lynch, Trustee, and Craig, Weller & Laugharn, his attorneys

Please Take Notice that on August 13, 1953, at 10 a.m. in the courtroom of Hugh L. Dickson, Referee in Bankruptcy, 339 Federal Building, Los Angeles, California, Ernest R. Utley, attorney for Motores de Mexicali, S. A. a corporation of the United States of Mexico, will move the above entitled Court for leave to file the Answer, Affirmative Defense and Cross Petition of Motores de Mexicali, S. A., a corporation of the United States of Mexico.

Said motion will be based upon the files and records in the above entitled case and upon said answer, affirmative defense and cross petition.

Dated: August 12, 1953.

JOHN L. MACE and
ERNEST R. UTLEY,
/s/ By ERNEST R. UTLEY,
Attorneys for Motores de
Mexicali. [11]

ANSWER, AFFIRMATIVE DEFENSE AND
CROSS PETITION OF MOTORES de
MEXICALI, S. A.

Comes now Motores de Mexicali, S. A., a corporation of the United States of Mexico, a creditor and interested party to the within proceeding and with permission of the Court first having been had and obtained, files this its answer to the petition of the Bank of America National Trust and Savings Association to reclaim property, and admits, denies, alleges and states:

I.

Admits the allegations contained in Paragraphs I and II of said petition.

II.

Answering Paragraph III of said petition, denies that the automobiles described in Schedule A attached to the petition as follows, to-wit:

1951 Buick 48D-2 Dr. Dyno. Mot. No. 65129114,
Lic. No. 1X32661.

1950 Olds. 8 98Dlx 4 Dr. Hydro, Mot. No. 8A-
357041H, Lic. No. 1X32666.

1952 Chev. SyDlx 4 Dr., Mot. No. KAA49792,
Lic. No. 1Y97954.

1952 Chev. SyDlx 4 Dr., Mot. No. KAA14323,
Lic. No. 1Y97952. [12]

are the property of the petitioner, Bank of America National Trust and Savings Association, and denies that said Bank of America National Trust

and Savings Association has a valid claim to said automobiles under and by virtue of certain trust receipt certificates made, executed and delivered by the bankrupt to the petitioner or otherwise.

Further answering said Paragraph III, Motores de Mexicali alleges that at all times mentioned in the petition to reclaim property herein, said Bank had knowledge that the possession of said automobiles had been acquired by the bankrupt from Motores de Mexicali and had not been paid for, and also had knowledge of all of the facts set forth in the affirmative defenses and cross-petition herein.

Further answering Paragraph III of said petition, Motores de Mexicali has no sufficient information or belief to enable it to answer the allegations in Paragraph III as to the remaining automobiles described therein and basing its answer thereon, denies generally and specifically each and every allegation contained in said paragraph not herein otherwise specifically denied.

Alleges that Motores de Mexicali is the owner of and entitled to the immediate possession of the automobiles above described for the reasons hereinafter alleged.

III.

Motores de Mexicali has no information or belief sufficient to enable it to answer the allegations contained in Paragraphs IV and V of said petition and basing its answer thereon, denies generally and specifically each and every allegation contained in each of said paragraphs.

IV.

Answering Paragraph VI of said petition, Motores de Mexicali denies that the automobile described in Schedule B [13] attached to the petition as:

1952 Buick Riv. Sup. Dyno, Motor No. 66741345, Lic. No. 1X61107 is or was the property of petitioner, Bank of America National Trust and Savings Association, and further denies that said vehicle is or was subject to any valid trust receipt certificate made, executed and delivered by the bankrupt or otherwise.

Further answering Paragraph VI of said petition, Motores de Mexicali alleges that at all times mentioned in the petition to reclaim property herein, said Bank had knowledge that the possession of said automobile had been acquired by the bankrupt from Motores de Mexicali and had not been paid for, and also had knowledge of all of the facts set forth in the affirmative defenses and cross-petition herein.

Motores de Mexicali alleges that said automobile described in this paragraph was and is the property of Motores de Mexicali and that said Motores de Mexicali is entitled to said automobile or any funds in the possession of the trustee received from the sale of said automobile for the reasons herein-after alleged.

Motores de Mexicali has no sufficient information or belief to enable it to answer as to the remaining automobiles or funds received from the sale of the automobiles described in Paragraph VI of said

petition, and basing its denial upon that ground, denies generally and specifically each and every allegation therein contained.

V.

Admits the allegations contained in Paragraph VII of said petition.

VI.

Motores de Mexicali has no information or belief sufficient to enable it to answer the allegations contained in Paragraphs VIII and IX of said petition and basing its denial upon that ground, denies generally and specifically each and every [14] allegation contained in each of said paragraphs.

First Affirmative Defense and Cross-Petition

By way of an affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

That at all times herein mentioned, cross-petitioner was and is now a corporation, duly created, organized and existing under and by virtue of the laws of the United States of Mexico, with its principal office at Mexicali, Baja California, Mexico.

II.

That on or about the 6th day of March, 1953, cross-petitioner herein was the owner and in possession of the following automobiles described in

Schedule A attached to the petition of the Bank of America National Trust and Savings Association herein, to-wit:

1951 Buick 48D-2 Dr. Dyno, Mot. No. 65129114,
Lic. No. 1X32661.

1950 Olds 8 98Dlx 4 Dr. Hydro, Mot. No. 8A-
357041H, Lic. No. 1X32666.

and on or about the 2nd day of April, 1953, was the owner and in possession of the following automobiles described in Schedule A attached to the petition of the Bank of America National Trust and Savings Association herein, to-wit:

1952 Chev. SyDlx 4 Dr. Mot. No. KAA49792,
Lic. No. IY97954.

1952 Chev. SyDlx 4 Dr. Mot. No. KAA14323,
Lic. No. IY97952.

and

1952 Buick Riv. Sup. Dyno, Mot. No. 66741345,
Lic. No. 1Y61107 described in Schedule B attached to said petition. That on the dates hereinabove mentioned, said automobiles had a reasonable value as follows: 1951 Buick - \$1300.00; 1950 Olds - \$1350.00; 1952 Chev. - \$1350.00; 1952 Chev. - \$1350.00; 1952 Buick - \$2000.00. [15]

III.

That on or about the 6th day of March, 1953, an oral agreement was made and entered into between cross-petitioner and the bankrupt herein, under which the bankrupt herein agreed to purchase from cross-petitioner the 1951 Buick and 1950 Olds mentioned and described in Paragraph II hereof

and agreed to pay therefor in cash the sum of \$1300.00 for the Buick and \$1350.00 for the Olds.

IV.

That at the time of said sale, the bankrupt executed and delivered to cross-petitioner the following drafts:

“ Automobile Purchase Draft

3 6 53 19....

Upon presentation of this draft to the bank designated below for Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali SA.....\$1300.00

Thirteen Hundred and no/00..... Dollars

(Year) 1951 (Make) Buick (Type) 2-dr.

Special (Motor No.) 65129114.

This Draft Will Be Honored With No Protest

Payable Through: Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“

Automobile Purchase Draft

3 6 53 19....

Upon presentation of this draft to the bank designated below [16] For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali SA.....\$1350.00

Thirteen Hundred Fifty and no/100..Dollars

(Year) 1950 (Make) Oldsmobile. (Type) 4-dr. sedan “98”. (Motor No.) 8A3570418.

This Draft Will Be Honored With No Protest

Payable through Wilshire-La Brea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

V.

That said drafts were then and there received by cross-petitioner as conditional payment for said automobiles; said drafts were duly presented by cross-petitioner in due course for payment to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and payment of said drafts were dis-

honored, and the bankrupt, due to its insolvency, was financially unable to and did not make payment of the sums evidenced by said drafts at any time and said drafts were at all times worthless and of no value to cross-petitioner.

VI.

That by reason of the premises, cross-petitioner is an unpaid seller under and pursuant to the provisions of Section 1772 of the Civil Code of the State of California, and is entitled to the possession of said automobiles and title thereto.

Second Affirmative Defense and Cross-Petition

By way of a second affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings [17] Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations in Paragraphs I and II of its first affirmative defense and cross-petition herein without the necessity of setting forth the same in full.

II.

That on or about the 2nd day of April, 1953, an oral agreement was made and entered into between cross-petitioner and the bankrupt herein, under which the bankrupt herein agreed to purchase from cross-petitioner the two 1953 Chevrolets and the 1952 Buick mentioned and described in Paragraph II of the first affirmative defense and cross-

petition herein, and agreed to pay therefor in cash the sum of \$1350.00 for each of the two Chevrolets and \$2000.00 for the Buick.

III.

That at the time of said sale, the bankrupt executed and delivered to cross-petitioner the following drafts:

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S A.....\$1,350.00
One Thousand Three Hundred and fifty and
no/100 Dollars

(Year) 1952 (Make) Chevrolet (Type) Sedan
4 door (Motor No.) KAA49792.

This Draft Will Be Honored With No Protest

Payable through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

[18]

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S. A. . . . \$1,350.00
One Thousand Three Hundred and Fifty and
no/100 Dollars

(Year) 1952 (Make) Chevrolet (Type) 4 door
Sedan (Motor No.) KAA14323.

This Draft Will Be Honored With No Protest

Payable Through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

Bi-Rite Auto Sales
/s/ Mario Rodriguez

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank.”

“ Automobile Purchase Draft

April 2, 1953

Upon presentation of this draft to the bank designated below For Collection Together With the documents, properly executed, indicated on the reserve hereof

Pay to Motores de Mexicali, S. A. . . . \$2,000.00
Two thousand and no/100 Dollars

(Year) 1952 (Make) Buick (Type) Riviera.
(Motor No.) 66741345. [19]

Payable through Wilshire-LaBrea Branch 16-146
Bank of America, National Trust and Savings
Association, Los Angeles, California.

This Draft Will Be Honored With No Protest

Bi-Rite Auto Sales

/s/ Mario Rodriguez

Collection Only

Instructions to Dealer: This draft may be presented in person to the drawee Branch or through your local bank."

IV.

That said drafts were then and there received by cross-petitioner as conditional payment for said automobiles; said drafts were duly presented by cross-petitioner in due course for payment to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and payment of said drafts were dishonored, and the bankrupt, due to its insolvency, was financially unable to and did not make payment of the sums evidenced by said drafts at any time and said drafts were at all times worthless and of no value to cross-petitioner.

V.

That by reason of the premises, cross-petitioner

is an unpaid seller under and pursuant to the provisions of Section 1772 of the Civil Code of the State of California, and is entitled to the possession of said automobiles and title thereto.

Third Affirmative Defense and Cross-Petition

By way of a third affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations contained in its first affirmative defense and cross-petition herein without [20] the necessity of setting forth the same in full.

II.

That at the time said drafts mentioned in the first affirmative defense and cross-petition herein were issued and delivered by the bankrupt to cross-petitioner, the bankrupt falsely and fraudulently represented to cross-petitioner that said drafts would be paid upon their presentation to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and that at the time the bankrupt was solvent and financially able to make payment of said drafts upon presentation to said bank. That in reliance upon said representations and each of them and believing same to be true, cross-petitioner did then and there deliver possession of said auto-

mobiles and evidence of title thereto to the bankrupt and it was understood and agreed that title in said automobiles was only conditional and that title thereto would become absolute in the bankrupt upon the payment of said drafts.

That the representations made by the bankrupt as herein alleged were all false and untrue in that said bankrupt was then insolvent and not in a financial position to make payment of said drafts and the bankrupt at no time had any intention of making payment of said drafts, or any of them, upon their presentation to the said bank or otherwise and said drafts have never been paid.

III.

That cross-petitioner believed said automobiles had been sold by the bankrupt to a bona fide purchaser prior to its discovery of said fraud and did not know said automobiles were still in the possession of the bankrupt until after the election of the trustee in bankruptcy herein; that immediately upon discovery that the trustee in bankruptcy had possession of said automobiles, cross-petitioner gave notice to said trustee in bankruptcy that cross-petitioner had title in and to said automobiles and made demand upon said trustee for the possession of same. [21]

Fourth Affirmative Defense and Cross-Petition

By way of a fourth affirmative defense to the petition in reclamation of the Bank of America National Trust and Savings Association and by

way of cross-petition herein, Motores de Mexicali alleges:

I.

Cross-petitioner adopts the allegations contained in its second affirmative defense and cross-petition herein without the necessity of setting forth the same in full.

II.

That at the time said drafts mentioned in the second affirmative defense and cross-petition herein were issued and delivered by the bankrupt to cross-petitioner, the bankrupt falsely and fraudulently represented to cross-petitioner that said drafts would be paid upon their presentation to the Bank of America National Trust and Savings Association, Wilshire-LaBrea Branch, Los Angeles, California, and that at the time the bankrupt was solvent and financially able to make payment of said drafts upon presentation to said bank. That in reliance upon said representations and each of them and believing same to be true, cross-petitioner did then and there deliver possession of said automobiles and evidence of title thereto to the bankrupt and it was understood and agreed that title in said automobiles was only conditional and that title thereto would become absolute in the bankrupt upon the payment of said drafts.

That the representations made by the bankrupt as herein alleged were all false and untrue in that said bankrupt was then insolvent and not in a financial position to make payment of said drafts and the bankrupt at no time had any intention of

making payment of said drafts, or any of them, upon their presentation to the said bank or otherwise and said drafts have never been paid. [22]

III.

That cross-petitioner believed said automobiles had been sold by the bankrupt to a bona fide purchaser prior to its discovery of said fraud and did not know said automobiles were still in the possession of the bankrupt until after the election of the trustee in bankruptcy herein; that immediately upon discovery that the trustee in bankruptcy had possession of said automobiles, cross-petitioner gave notice to said trustee in bankruptcy that cross-petitioner had title in and to said automobiles and made demand upon said trustee for the possession of same.

Wherefore, cross-petitioner prays that it be permitted to file its answer, affirmative defenses and cross-petition herein; that it be decreed to be the owner of and entitled to immediate possession of the automobiles herein set forth and that the trustee deliver possession thereof to cross-petitioner; that the Court determine that the Bank of America National Trust and Savings Association has no valid pledge, mortgage, claim or lien upon said automobiles or any of them under the trust receipt certificates alleged in its petition for reclamation, or otherwise; that in the event the trustee cannot deliver said automobiles to cross-petitioner in their original form and is in position to deliver said property in a modified form, that the trustee be

required so to do, and for such other and further relief as the Court may deem just and proper in the premises.

JOHN L. MACE and
ERNEST R. UTLEY,
/s/ By ERNEST R. UTLEY,
Attorneys for cross-petitioner. [23]

Duly Verified. [24]

Acknowledgment of Service attached. [25]

[Endorsed]: Filed August 13, 1953.

[Title of District Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE

Comes now E. A. Lynch, trustee in bankruptcy, and in answer to the "Petition to Reclaim Property" filed by the Bank of America National Trust and Savings Association, admits, denies and alleges as follows:

I.

Admits as true the allegations contained in Paragraphs I, III, IV, V, VIII and IX.

II.

Respondent admits that at the time of the filing of the petition in bankruptcy, the bankrupt had in his possession certain motor vehicles, more particularly described in columns one and two of Schedule "A" of the petition filed herein, but de-

nies generally and specifically each, every and all of the other allegations contained in Paragraph II of the "Petition to Reclaim Property" herein.

III.

Respondent admits each, every and all of the allegations contained in petitioner's Paragraph VI except that he denies generally and specifically that while the seven (7) motor vehicles mentioned in the said paragraph were in the possession of the bankrupt [26] and the said vehicles were sold and the proceeds of the sale were not delivered or paid over to the petitioner herein and that under certain trust receipts and certificates, the bankrupt did agree to hold the automobiles and the proceeds of sale thereof in trust for your petitioner, and, further, respondent denies that he now holds the proceeds of any such sales in trust for the petitioner or that the balance of the said proceeds due the petitioner from any sale of any motor vehicles is the sum of \$6959.00, or any other sum, or at all.

IV.

Referring to Paragraph VII, trustee admits that E. A. Lynch has been appointed trustee of the said bankrupt estate and that the motor vehicles set forth in Schedule "A" attached to the petitioner's petition herein are in the possession of the trustee, but denies generally and specifically each, every and all of the other allegations contained in the said paragraph.

V.

Petitioner represents that four of the automobiles set forth in the "Petition to Reclaim Property" on file herein are also the subject of a demand made upon the trustee in bankruptcy by Ernest R. Utley on July 23, 1953 as attorney for Motores de Mexicali, which automobiles may be more particularly described as follows:

1951 Buick 48D-2 Dr. Dyno., Motor No. 65129114, License No. 1X32661

1950 Olds. 8 98Dlx 4 Dr. Hydro, Motor No. 8A357041H, License No. 1X32666

1952 Chev. SyDlx 4 Dr., Motor No. KAA49792, License No. 1Y97954

1952 Chev. SyDlx 4 Dr., Motor No. KAA14323, License No. 1Y97952

VI.

Petitioner alleges that as to the said four automobiles, it admittedly has no equity but cannot release the same to the petitioner, Bank of America National Trust & Savings Association, in [27] the face of the adverse claim made thereto by Motores de Mexicali.

Wherefore, your respondent prays:

That petitioner take nothing by reason of the petition herein.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDonnell,

Attorney for Respondent. [28]

[Endorsed]: Filed August 13, 1953.

[Title of District Court and Cause.]

STIPULATION

Whereas, Mr. E. A. Lynch, trustee in the above captioned bankruptcy, presently has in his possession a stock of motor vehicles, as assets of the above captioned estate; and

Whereas, Motores de Mexicali, a corporation of the United States of Mexico, by and through its counsel, Ernest R. Utley, has on July 23, 1953 made formal demand upon the trustee and claim to the automobiles set forth in Exhibit "A" attached hereto; and

Whereas, the trustee has in his possession at the present time only those automobiles claimed by the said Motores de Mexicali as are indicated by an asterisk (*) on the attached Exhibit "A"; and

Whereas, the said four automobiles are also claimed by the Bank of America National Trust and Savings Association under and by virtue of trust receipts held by the said Bank of America National Trust and Savings Association; and

Whereas, litigation has heretofore been commenced by and between Motores de Mexicali, Bank of America National Trust and Savings Association and the trustee in bankruptcy to determine title in and to the said automobiles; and

Whereas, it is the desire of Motores de Mexicali and the [29] trustee herein to liquidate all of those cars claimed by the said Motores de Mexicali as soon as possible through the medium of a public

auction sale to be conducted by the trustee personally.

Now, Therefore,

It Is Hereby Stipulated by and between Motores de Mexicali, a corporation of the United States of Mexico, and E. A. Lynch, trustee in bankruptcy for Erbel, Inc., dba Bi Rite Auto Sales, bankrupt, by and through their respective counsel, that the trustee herein may sell and dispose of the cars indicated on the attached Exhibit "A" by an asterisk (*), the trustee to impound the net proceeds of such sales after deducting therefrom any expenses of the conduct of the said sales, said funds to be impounded until a further order of the bankruptcy court be made fixing and determining to whom the said funds belong.

And, It Is Further Stipulated that the rights of Motores de Mexicali will attach to the said proceeds of the sale of the said automobiles in the same manner and to the same extent as the rights of the said Motores de Mexicali, if any, attached to the said automobiles.

Dated: August 12, 1953.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDONNELL,

Attorneys for Trustee.

Note: Subject to letter attached.

/s/ ERNEST R. UTLEY,

Attorney for Motores de
Mexicali. [30]

[Endorsed]: Filed August 18, 1953.

[Title of District Court and Cause.]

STIPULATION TO IMPOUND FUNDS AND
RELEASE TITLES PENDING FURTHER
ORDER OF COURT

Whereas, the Bank of America National Trust and Savings Association has heretofore filed on July 29, 1953 a "Petition to Reclaim Property" on which an Order to Show Cause was issued against the above-captioned bankrupt estate on July 29, 1953, and by which the said Bank sought to assert some right, title or interest in and to certain automobiles or the proceeds of the sale thereof; and

Whereas, the Trustee herein filed on August 13, 1953 an "Answer to Order to Show Cause" alleging that the said bank was without rights to the proceeds of the sale of the claimed automobiles, but admitting the interest of the Bank by virtue of certain Trust Receipts held by it; and

Whereas, Motores de Mexicali S.A. filed herein an "Answer, Affirmative Defense and Cross Petition" by which it sought to intervene in the hereinbefore described proceedings and assert what it claimed to be rights superior to either the Bank of America or the bankrupt estate in and to certain automobiles, or the proceeds of their sale; and

Whereas, a hearing was held on the Bank's "Reclamation Petition" and Motores de Mexicali S.A. "Petition to Intervene" on August 13, 1953 [39] at 10:00 a.m., which hearing was continued to

August 19, 1953 at 11:00 a.m., at which time all matters were taken under submission by the Court; and

Whereas, the Trustee has arranged for or otherwise effected sales of certain automobiles, title to which is in dispute in the previously described proceedings; and

Whereas, it is the desire of all parties hereto to permit the Trustee to complete the said sales so long as the proceeds thereof are impounded pending a final disposition of all claims thereto by the Bank of America, Motores de Mexicali S.A. and E. A. Lynch, Trustee.

It Is Hereby Stipulated: by and between the Bank of America National Trust and Savings Association, Motores de Mexicali S.A., and E. A. Lynch, Trustee in Bankruptcy for Erbel Inc., bankrupt, by and through their respective attorneys as follows:

That the Trustee may sell or may complete the sale or otherwise arrange for the sale of the following described automobiles for the indicated realizations:

Description: 1951 Buick; Motor No. 65129114; License No. IX32661; Realization, \$1300.

Description: 1950 Oldsmobile; Motor No. 8A-357041H; License No. IX32666; Realization, \$1250.

Description: 1952 Chevrolet; Motor No. KAA49-792; License No. IY97954; Realization, \$1200.

Description: 1952 Chevrolet; KAA14323; License No. IY97952; Realization, \$1150.

Description: 1948 Cadillac; Motor No. 486238723; License No. IS67865; Realization, \$1672.82.

Description: 1952 Buick; Motor No. 66741345; License No. IY61107; Realization, \$2041.

Description: 1950 Chevrolet; Motor No. HAA-702291; License No. 1Y61111; Realization, \$1341.32.

Description: 1947 Mercury; Motor No. 799A1-626018; Realization, \$400.

And that Bank of America will release to the Trustee any and all documents of title necessary to enable the Trustee to deliver good title to the said automobiles.

II.

That the Trustee will hold and impound the sum of \$10,355.14 subject to a final order of this Court fixing and determining the respective rights of all parties hereto in and to the said fund [40] and/or the automobiles the sale of which produced it.

HUGO A. STEINMEYER,
ROBERT H. FABIAN,
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Bank of America.

/s/ ERNEST R. UTLEY,
Attorney for Motores de
Mexicali S.A.

CRAIG, WELLER & LAUGHARN,
/s/ By C. E. H. McDONNELL,
Attorneys for E. A. Lynch,
Trustee. [41]

[Endorsed]: Filed September 2, 1953.

[Title of District Court and Cause.]

MEMORANDUM OPINION RELATIVE TO
TITLE OF CERTAIN MOTOR VEHICLES
OR THEIR PROCEEDS

This is a three-cornered controversy between Bank of America, the Trustee in Bankruptcy, and Motores de Mexicali, S. A., a Mexican corporation, over the title to certain motor vehicles, or the proceeds from the sale thereof.

Craig, Weller & Laugharn, Attorneys for Trustee in Bankruptcy.

Hugo A. Steinmeyer, Robert H. Fabian and Robert van Buskirk, Attorneys for Bank of America National Trust and Savings Association, (hereinafter referred to as the Bank).

Ernest R. Utley, Attorney for Motores de Mexicali, a Mexican corporation, (hereinafter referred to as the Mexican Corporation).

I.

Statement of the Case

This is a voluntary bankruptcy proceeding commenced July 2, 1953. At that time an adjudication was had and the case was referred to Referee in Bankruptcy Hugh L. Dickson for [42] administration. He has requested the undersigned Referee in Bankruptcy to handle this particular controversy. (Bankruptcy Rule 209a, SD Cal.) On July 28, 1953, E. A. Lynch was appointed and qualified as Trustee in Bankruptcy.

On July 29, 1953 the Bank filed a petition to

reclaim from the bankrupt estate certain motor vehicles, or in lieu thereof, the Trustee in Bankruptcy be authorized and directed to sell the same and out of the proceeds of the sale pay over to the Bank \$6,959.00. On August 13, 1953, the Trustee in Bankruptcy filed an answer to the said petition, wherein he put in issue most of the material allegations of the petition, and also alleged that four of the motor vehicles involved were claimed by the Mexican corporation. On August 13, 1953, said Mexican corporation served and filed its notice of motion for leave to file on its behalf an answer, affirmative defense and cross petition with respect to said four motor vehicles and one more. On that date, without objection, said motion was heard and granted. In the said pleading the said Mexican corporation prayed that it be declared the owner of and entitled to the immediate possession of the motor vehicles therein specified (the five cars above mentioned) and that the Bank had no lien or claim thereon whatever; and that in the event the Trustee could not deliver said motor vehicles to said Mexican corporation in their original form, but was in a position to deliver the same in a modified form, that the Trustee be required so to do.

On August 18, 1953, a stipulation was entered into between the Trustee in Bankruptcy, the Bank and said Mexican corporation, whereby the Trustee was empowered to sell certain cars therein specified, and impound the net proceeds of the sales, after deducting therefrom the expenses of the sales, such impounding to continue until the Bankruptcy

Court determined to [43] whom the said funds belong; all the rights of the said Mexican corporation to attach to the proceeds of the said sales in the same manner and to the same extent as such rights attached to the said motor vehicles themselves. This stipulation included four of the cars claimed by the Mexican corporation, and other cars, upon all of which the Bank held trust receipts.

On August 26, 1953 the Trustee filed a statement of the disposition of certain motor vehicles, including four of the cars claimed by the Mexican corporation, and six others, upon all of which the Bank held trust receipts. A list of the prices received for the same was attached, together with a list of certain motor vehicles abandoned to the Bank as being without any equity therein for the bankrupt estate.

On September 2, 1953 the three parties involved filed herein a stipulation for the Trustee to sell certain cars upon all of which the Bank held trust receipts, including one car claimed by the Mexican corporation, and to impound the funds derived therefrom, and release title, pending the further order of the Court.

A hearing of this controversy was held before the undersigned Referee in Bankruptcy on August 13, 1953. The reporter's transcript of the proceeding was filed August 19, 1953.

II.

Statement of the Evidence

Over a period of months the bankrupt corpora-

tion borrowed money from the Bank, which borrowings were secured by trust receipts on motor vehicles executed and delivered by the bankrupt to the Wilshire-LaBrea Los Angeles branch of the Bank, through the medium of its assistant cashier. The Bank complied with the requirements of Secs. 3016, et seq. of the California Civil Code, with respect to these trust receipts. [44] All the vehicles in which the three parties here claim an interest have been sold, except certain cars abandoned to the Bank as burdensome. The money realized therefrom has been impounded to await the decision of the Court. The Trustee has paid off to the Bank a number of trust receipts upon cars not in controversy here.

The Mexican corporation sold and delivered to the bankrupt five cars, hereinafter more particularly described, upon receiving from it certain documents, all of which were in the same form. Each was entitled: "Automobile Purchase Draft," was signed by the bankrupt, and recited that upon presentation of the draft to the Wilshire-LaBrea Los Angeles branch of the bank for collection, together with the title documents, the Bank would pay to the Mexican corporation the amount of the draft. The title documents did not accompany the drafts, but were delivered by the Mexican corporation to the bankrupt at the same time it executed and delivered the drafts. These parties had previously handled similar transactions in a similar manner. Two of the drafts were dated March 6, 1953, and three April 2, 1953. The two drafts dated

March 6, 1953 were returned unpaid to the Mexican corporation's bank on March 18, 1953. These drafts were sent back by the Mexican corporation's bank for collection on March 28, 1953, and then returned to such bank unpaid on May 19, 1953. The two drafts dated April 2, 1953 were forwarded for collection by the Mexican corporation's bank on April 6, 1953. These drafts were returned unpaid on May 19, 1953, to the said Bank. The assistant cashier of the branch bank, who handled the trust receipts had actual knowledge on May 19, 1953, that these drafts had not been honored.

The Bank advanced money on trust receipts on the cars covered by the drafts, and which cars are now claimed by the [45] Mexican corporation, as follows: April 6, 1953, 1951 Buick, Engine No. 65129114, \$1200.00; April 8, 1953, 1950 Oldsmobile, Engine No. 8A357041H \$1137.00; May 9, 1953, 1952 Buick, Engine No. 66741345, \$1612.00; May 19, 1953, 1952 Chevrolet, Engine No. KAA49792, \$1068.00 and 1952 Chevrolet, Engine No. KAA-14323, \$1068.00. The Trustee, by stipulation, sold these cars and received the following gross prices: 1951 Buick, Engine No. 65129114, \$1200.00; 1950 Oldsmobile, Engine No. 8A357041H, \$1250.00; 1952 Buick, Engine No. 66741345, \$2041.00; 1952 Chevrolet, Engine No. KAA49792, \$1200.00; and 1952 Chevrolet Engine No. KAA14323, \$1150.00, or a total of \$6841.00. The Bank claims a balance of principal of \$2410.00 due on trust receipts upon not only the 1952 Buick, Engine No. 66741345 which the Trustee sold for \$2041.00 as above stated,

but also upon a 1950 Chevrolet, Engine No. HAA-702291, which the Trustee sold for \$1341.32, and a 1947 Mercury, Engine No. 799A1626018, which the Trustee sold for \$400.00.

The Mexican corporation knew that the purpose of delivering title before the drafts were paid was to enable the bankrupt to have the cars "floored" by the Bank, and trust receipts issued by it in consideration of cash advances to be made to the bankrupt so it could pay off the drafts. The bankrupt represented at that time to the Mexican corporation that the drafts would be paid promptly, the same as a check. These bank drafts were not honored, and the purchase price was never paid. No notice of rescission was ever given by the Mexican corporation to the bankrupt at any time prior to bankruptcy.

The Sheriff of Los Angeles County sold a 1948 Cadillac for \$1672.82, which money was paid into the estate and is still there. The Bank claims a balance of principal on its trust receipt on this car in the amount of \$1614.00.

It was stipulated by all parties that the Trustee should [46] deduct from all sales prices the reasonable expenses of the sales.

Certain conversations between representatives of the bankrupt and of the Mexican corporation were admitted into evidence, subject to the Bank's motion to strike out such evidence as irrelevant.

III.

Questions Presented

1. Did title to the five cars claimed by the Mexican corporation pass from it to the bankrupt; and if it did, was it necessary for the Mexican corporation to rescind in some manner in order to have such title set aside?

2. Even if title did not pass, did the Mexican corporation clothe the bankrupt with such indicia of title and possession as to protect the Bank in its issuance of trust receipts, if it be shown that the Bank was a bona fide encumbrancer for value without notice?

3. Is knowledge of an employee of the Bank, not an officer, and not communicated to an officer of the Bank, binding upon the Bank?

4. Did the Bank trace funds into the hands of the Trustee which were proceeds of the sale by the Sheriff of a Cadillac car upon which the Bank held a trust receipt?

5. Were conversations between representatives of the Mexican corporation and the bankrupt relevant where they were not heard by or communicated to any representative of the Bank?

IV.

Comment on the Law

1. In View of All the Circumstances, Title Did Not Pass From the Mexican Corporation to the Bankrupt.

The Mexican corporation claims only the proceeds (less expenses) of the five cars above men-

tioned, viz., 1951 Buick, [47] 1950 Oldsmobile, two 1950 Chevrolets and a 1952 Buick. The total gross proceeds of the sales was \$6841.00.

The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank.

The California law seems clear that where the terms of sale are cash, the title to the goods does not pass until payment of the price. *Puritas Coffee & Tea vs. De Martini*, 56 C.A. 528, 206 P. 98. And where a check is given upon delivery, the sale is one for cash, and if the check is dishonored the title to the goods, as between the parties remains in the seller. *South San Francisco Packing and Provision vs. Jacobsen*, 183 C. 131, 190 P. 628; *Peerless Motor Co. vs. Sterling Finance*, 139 C.A. 621, 34 P.(2) 738; *Clark vs. Hamilton Diamond*, 209 C.1, 284 P. 915. See to the same effect: *DeVries vs. Ellison*, DC Minn. 100 F.S. 781 affirmed CCA 8 199 F.(2) 677, (Iowa and Minnesota law); *Engstrom vs. Benzel*, CCA 9, 191 F.(2) 689, (Washington law); *Johnson vs. Robinson*, CCA 5, 203 F.(2) 135 (Texas and Oklahoma law). Where cattle are sold for cash and a draft is given for the purchase price, but the draft is dishonored, title as between the parties to the sale remains in the seller. *Towey vs. Esser*, 133 C.A. 669, 24 P.(2) 853. We are not dealing here with a situation where a check

or draft is given in absolute payment Peerless Motor vs. Sterling Finance, 139 C.A. 621, 34 P.(2) 738, in which event title passes even if the check or draft is not honored.

But we have a bothersome question and that is what effect does California Civil Code, Sec. 1781 (2) have on the situation here. That section provides that a transfer of title [48] shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by overt act an intention to rescind. These draft transactions occurred in March and April of 1953. The bankruptcy commenced July 2, 1953. No notice of rescission was ever given by the Mexican corporation, nor did it do anything to indicate such an intention, at least until after the date of bankruptcy. Promptness is required in rescission. California Civil Code Sec. 1691 (1). Here the Mexican corporation did nothing for some months before bankruptcy after they were notified that the drafts would not be paid; but the time involved was not long before the date of bankruptcy, and so lack of actual rescission on the part of the Mexican corporation may be condoned, if such rescission was necessary.

2. Even Though Title Did Not Pass, the Mexican Corporation Clothed the Bankrupt With Such Indicia of Title and With Such Possession as to Estop the Mexican Corporation From Questioning the Title of the Innocent Bank.

The law is clear in California that where an owner of property clothes another with apparent

title to, or power of disposition over it, and an innocent third party is thereby induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title. *Fowler vs. Nat'l Bank of California*, 167 C. 653, 140 P. 271; *Butler vs. Woodburn*, 19 C.(2) 425, 122 P.(2) 17; *Western States Acceptance vs. Bank of Italy*, 104 C.A. 19, 285 P. 340; *Conklin vs. Benson*, 159 C. 786; 116 P. 34; *Phelps vs. American Mortgage Co.* 40 C.A.(2) 361; 104 P.(2) 880; *Sidney vs. Wilson*, 67 C.A. 283, 227 P. 672. See also in other jurisdiction, *Syrolshka vs. Pleniozek*, 63 N.E.(2) 675, 327 Ill. App. 218; *Sullivan vs. Wells*, D. Neb. 89 F.S. 317; *J. L. McClure Motor Co. vs. McClain* (Ala) 42 S.(2) 266; *Plummer vs. Kingsley* [49] (Ore) 226 P.(2) 296; *Wren vs. Bankers' Investment* (Ore) 249 P.(2) 716. Sec. 3543 of the California Civil Code provides that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. It is stated in the case of *Collins vs. O'Connell*, CCA 9 136 F.(2) 141, that this rule is based upon the principle of "equitable estoppel."

The situation here is that both the Mexican corporation and the Bank were innocent parties. The third and guilty party was the bankrupt. A mere failure to perform an agreement or to keep a promise, is not fraud. *Brison vs. Brison*, 75 C 525, 17 P 689; *Maynes vs. Angeles Mesa Land*, 10 C.(2) 587, 76 P.(2) 109; *Rheingans vs. Smith*, 161 C 362, 119 P 494. While a promise made without any intention of performing it is fraudulent (*Hayes vs.*

Glouster, 88 C 560, 26 P 367; Cutler vs. Bowen 10 C.(2) 31, 51 P.(2) 164); there is no evidence here that the bankrupt had any such intention. No evidence was presented to show that the Bank knew or had cause to believe that the sale was to be a cash transaction, or that the bankrupt represented to the Mexican corporation that the drafts would be honored when presented. The mere fact that drafts were not honored was not sufficient to put the Bank on notice that there might be some fraud on the part of the bankrupt in the transactions. The bank acted in good faith in issuing the trust receipts, relying upon the indicia of title to the cars furnished by the Mexican corporation to the bankrupt, and delivered by the latter to the Bank. Furthermore, the Mexican corporation knew that the bankrupt proposed to use the muniments of title given to it for the purpose of enabling it to borrow money from the bank to pay off the Mexican corporation, through the flooring of the cars by trust receipts. Under this circumstance alone, it hardly lies in the mouth of the Mexican corporation to assert that the Bank, and [50] not it, should be the one to suffer by the default of the bankrupt. Bankruptcy courts operate on equitable principles. (Stegman vs. Knudsen, CCA 9, 152, F.(2) 871; in re Los Angeles Lumber Co. SD Cal., 46 F.S. 77; in re Loose SD Cal., 52 F.S. 20, 54 ABR NS 786; in re Setzler, SD Cal., 73 F.S. 314). It is difficult to conceive that a court of equity would approve the stand taken by the Mexican corporation. It was negligent in several particulars. It could

have protected itself by (1) first securing a certified check or a cashier's check or (2) by sending the muniments of title along with the drafts to the bank, when by doing so the bank would have been bound not to issue, except at its peril, trust receipts until the drafts were paid.

Mere possession of the cars by the bankrupt would not have been sufficient to protect the bank in going ahead and issuing trust receipts thereon (*Martin vs. Hollins*, 118 C.A. 561, 5 P.(2) 899), but, since the bankrupt not only had possession but also the title papers to the cars, and the title papers were not attached to the drafts, the Bank was justified in assuming that the transactions between the Mexican corporation and the bankrupt were sales on credit and not sales for cash. An illustrative case of a sale for cash is that of *Alonso vs. Badger*, 58 C.A.(2) 752, 138 P.(2) 24. There the cash sale transaction was that title to lambs would pass under a bill of sale attached to a draft drawn by a livestock dealer upon a livestock commission broker; and when the broker refused to honor the draft no sale resulted. Another example of a cash sale is that where goods are shipped on a bill of lading, with a draft attached. 77 CJS 1075. Similar circumstances did not exist here.

It appears that a clear case of "equitable estoppel" is here presented. [51]

3. Knowledge of an Employee of the Bank, Not an Officer or a Manager of a Branch, Not Communicated to Some Officer or Manager, Does Not Bind the Bank.

It is contended by the Mexican corporation that the knowledge of the Assistant Cashier of the branch Bank, who handled the trust receipts, that the drafts were not paid, was sufficient notice to the Bank not to issue the trust receipts except at its peril. The general rule appears to be that the knowledge of an officer of a bank within the scope of his duties is imputable to the corporation. *Sanders vs. Magill* 9 C.(2) 145, 70 P.(2) 159; *Vanciel vs. Kumle*, 26 C.(2) 732, 160 P.(2) 802; *Bank of Mountain View vs. Winebrenner* (Mo.App.) 189 S.W.(2) 429, *aff'd* 195 S.W.(2) 486. The cases include in the term "officer" not only the president and vice-presidents but also the cashier, an assistant cashier and a branch bank manager. *Christie vs. Sherwood*, 113 C. 526, 45 P 820; *First Nat'l vs. Reed*, 198 C. 252, 244 P. 368; *Williams vs. Hasagen*, 166 C. 386, 137 P. 9; *Vanciel vs. Kumle*, 26 C.(2) 732, 160 P.(2) 602; *ex parte State* 77 So. 353, 201 Ala. 59, *rev'g Kramer vs. State* 75 So. 185, 16 Ala.App. 40; *Cox vs. First Nat'l*, 10 C.A.(2) 302, 52 P.(2) 524. But this does not apply to employees of a bank who are not officers or do not occupy a managerial capacity. (*Globe Indemnity vs. Union and Planters' Bank & Trust* CCA 6, 27 F.(2) 496; *State vs. Brown County Bank*, 200 N.W. 866, 112 Neb. 642); *Hartford vs. All Night and Day Bank*, 170 C. 540, 150 P. 536), except under unusual circumstances as in the case of *San Mateo County Bank vs. Dupret*, 124 C.A. 395, 12 P.(2) 669, where an agent of the bank bid in certain property at a tax sale.

But in our case here, as we have discussed in No. (2) above, the Bank or its said assistant cashier had no reason when the trust receipts were issued, to assume or believe that [52] the transactions between the Mexican corporation and the bankrupt were cash sales, or were other than sales on credit. This appeared from the nature of the papers submitted to the Bank and the manner in which they were submitted.

4. The Bank Traced Into the Hands of the Trustee Funds Derived from the Sale of a Car Upon Which it Had Issued Unpaid Trust Receipts.

In order to reclaim trust funds or property from a bankrupt estate, these must be traced into the estate in their original or substituted form; and they must be on hand and not dissipated; In re Acheson CCA 9, 22 ABR 338, 170 F. 427; City of Dallas vs. Crippen, CCA 5, 171 F.(2) 526; American Service vs. Henderson, CCA 4, 46 ABR NS 408, 120 F.(2) 525. The Bank clearly traced into the hands of the Trustee the proceeds, viz., \$1672.82, of a sale of a Cadillac car under legal process; and the said fund is still in the hands of the Trustee and has not been dissipated. Upon this car the Bank held a trust receipt, the balance of principal due thereon being \$1614.00.

5. Conversations Between the Mexican Corporation and the Bankrupt Were Not Relevant Where They Were Not Heard by or Communicated to Any Representative of the Bank.

These conversations were not heard by any representative of the Bank, nor was their substance

ever communicated to the Bank. Under these circumstances, it appears elemental that what was said in such conversations was irrelevant and could not in any manner bind the bank. "Things done between strangers ought not to injure those who are not parties to them". This doctrine is referred to as "res inter alios acta" or "res inter alios acta alteri nocere non debet." Chapman vs. Metropolitan Life 173 S.E. 801, 807, 172 S.C. 250; Nicholas vs. Granite State Fire 24 S.E.(2) 280, 284, 125 W. Va. 349; Carroll vs. Rye Township, 101 N.W. 894, 897, 13 N.D. 458. [53]

V.

Conclusion

The judgment must be as follows:

1. The claims of the Mexican corporation must be denied.

2. The Bank will be entitled to recover from the Trustee as proceeds of sales by him (less reasonable expenses of sales, the amount thereof to be agreed upon between the Mexican corporation, the Trustee and the Bank, or, if they fail to agree to be settled by the Referee after hearing upon due notice), the sum of \$8497.00, derived as follows: 1951 Buick, Engine No. 65129114, \$1200.00; 1950 Oldsmobile, Engine No. 8A357041H, \$1137.00; 1952 Chevrolet, Engine No. KAA14343, \$1068.00, 1952 Chevrolet, Engine No. KAA49792, \$1068.00; 1952 Buick, Engine No. 66741345, 1950 Chevrolet, Engine No. HAA-702291, 1947 Mercury, Engine No. 799A1626018 - \$2410.00, or a total of \$6883.00. The Sheriff of Los

Angeles County sold for \$1672.82 a 1948 Cadillac, Engine No. 486328723 upon which the Bank holds a trust receipt, the balance due being \$1614.00. This makes a total to be paid by the Trustee to the Bank of \$8497.00.

3. The Mexican corporation is entitled to be paid by the Trustee any surplus over and above the amount received from the sale of the five cars in which it is interested after deduction of the expenses of sale and the amount due the Bank.

4. The motion to strike out the testimony of representatives of the bankrupt and the Mexican corporation, to which the Bank was not a party, must be granted. The Bank cannot be awarded interest on its trust receipts after the date of bankruptcy. As stated in *Beecher vs. Leavenworth State Bank* CCA 9, 192 F.(2) 10, it is a general rule that interest stops on secured claims at the date of bankruptcy. The only exceptions to the rule are (1) where the estate is fully solvent; and (2) where the securities pledged to the secured creditor [54] yield income. The facts in this case do not fit either of these exceptions.

Counsel for the Bank will, pursuant to Gen. R. No. 7 of this Court, prepare, serve and file appropriate findings of fact, conclusions of law and order.

Dated: November 19, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [55]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW OF-
FERED BY THE BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSO-
CIATION

Comes now Motores de Mexicali, S. A., hereinafter called "Motores", and objects to the proposed findings of fact and conclusions of law offered by the Bank of America National Trust and Savings Association, hereinafter called the "Bank", and in addition to said objections, Motores proposes its own findings of fact and conclusions of law and order. That in presenting said findings of fact and conclusions of law, it will be understood that Motores does not agree with the adverse findings and conclusions reached by this Honorable Court in its memorandum opinion, but Motores nevertheless has endeavored to prepare findings of fact and conclusions of law consistent with the Court's memorandum opinion, and has endeavored to eliminate matters found in the proposed findings of the Bank which are not supported by the evidence or called for in the Court's memorandum opinion.

I.

Objects to the following language in paragraph number 8 of the Bank's proposed findings, to-wit: "as trustee for the bank pursuant to said trust receipts." (See page 4, lines 15-16 of said [56] find-

ings.) as a conclusion of law and not a finding of fact.

II.

Objects to the Bank's proposed finding number 9, for the reason that it fails to show, as found by the Court, that these automobiles were sold for cash and delivered and that the sale was a conditional sale under Section 1762 C. C. The delivery of the cars and the muniments of title and the payment of the drafts were concurrent conditions. The Bank's proposed findings further state that the drafts were "non-negotiable drafts drawn upon itself" etc. The Court, in its memorandum opinion, (page 4, line 10) refers to these drafts as "automobile purchase drafts" and these exact words are printed on the drafts, and we have referred to them in our proposed findings by that name. We have also, in our proposed findings, referred to the drafts by exhibit number, rather than attempting to reach a legal conclusion as the Bank has done in referring to them as "non-negotiable". This language again is clearly a legal conclusion and has no place in a finding of fact.

III.

Objects to the Bank's finding number 10 for the reason that it is neither supported by the evidence nor called for in the Court's opinion. Mr. Luken testified at page 68, lines 4-9, Reporter's Transcript:

"He told us they needed the titles in order to bring the cars across the border, bring them into

California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank."

See also his testimony at page 68, lines 21 to 23:

"No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money." [57]

This is supported by the testimony of Mr. Resnick and is not disputed. (See page 61, lines 16-17 Reporter's Transcript.)

In other words, as found by the Court, this was intended to be and was a cash sale; the draft was the same as a check. Motores, therefore, conditionally, delivered both the automobiles and the muniments of title thereto so that:

1st. The bankrupt could bring the automobiles across the International Border and into California.

2nd. The bankrupt could secure California registration, and with the California registration, the cars could be floored with the Bank and the bankrupt could "pay the drafts immediately upon presentation to the bank." As above indicated, Mr. Luken said: "We wouldn't give the titles unless we get the money." Therefore, Motores' delivery of the cars and muniments of title was conditional upon its getting the money. In other words, a cash sale, and in a cash sale you usually deliver to the buyer the property he purchases.

Finding number 10 is cleverly worded so as to leave out some of the most essential facts under the evidence. The advances of funds referred to in this finding were, according to the undisputed evidence, for one purpose only and that was to pay the drafts promptly, which fact the Bank has cleverly left out of its finding as well as the other important facts hereinabove referred to.

IV.

Objects to Bank's finding number 11 on the same ground as the last objection. Again the finding eliminates the purpose for the flooring of the automobiles, to-wit: to pay the drafts promptly, and the delivery of the cars and muniments of title thereto were conditional upon this very fact.

Objects to the finding of good faith upon the part of the Bank. We respectfully urge that the Bank had knowledge that [58] these very automobiles upon which it was lending money had not been paid for, and that Motores was an unpaid seller. This, together with the fact that the drafts indicated that title to the cars would accompany the drafts certainly put the Bank upon inquiry. To make our point a bit plainer—suppose Resnick had stolen these muniments of title, and he, in fact, did because he obtained them under false representations, and that constituted larceny by trick and device. Under such circumstances, could it be said that the Bank acted in good faith and was not put upon inquiry?

V.

Objects to finding number 12. It is not supported by the facts. Without unduly prolonging our objection, what we hereinabove stated applies with equal force here. It leaves the impression that Motores accepted the last three drafts after the first two, to its knowledge, had been dishonored, while the undisputed testimony is to the contrary.

We also respectfully submit that the evidence will not support a finding that the bank had "no knowledge" that the sale was for cash. It most certainly had some knowledge, even though it might be contended this knowledge was insufficient.

VI.

Objects to finding number 13. Here again the Bank cleverly leaves out important findings such as "immediately" before the words "upon presentation" at page 6, line 28.

Furthermore, to find that the bankrupt intended to fulfill its promise referred to in this finding is utterly ridiculous. Resnick, himself, testified that he was to floor the cars "so I could pay for them." This is in harmony with Luken's testimony above quoted. The fact remained that he floored the cars, he got the money and he didn't pay for them. And, he got the money from the bank on these very cars while these drafts were in the possession of the bank. In fact, the money was borrowed on the [59] two Chevrolets the same day the drafts were returned dishonored. Yet, in the light of these undisputed facts, the Bank would urge upon this

Court a finding that the bankrupt intended to fulfill its promise. Intent is determined from the acts and conduct of the person affected. Resnick's acts and conduct show a deliberate intent to defraud and to take something which did not rightfully belong to him or his company.

VII.

Objection is made to the Bank's findings numbers 14 and 15 based upon the same general reason which we have heretofore urged.

VIII.

Objection is made to finding number 16 for the reason that it is in direct conflict with both the evidence and the Court's opinion. The assistant cashier, Mr. Fort, who loaned the bankrupt money upon these trust receipts testified that he knew the drafts were unpaid on May 19, 1953 (Reporter's Transcript, pages 44-45) and on that day he loaned the bankrupt money upon the two Chevrolets, and the bankrupt was not credited therewith until the 21st. This should be sufficient to show the impropriety of this finding.

VIII.

Objects to the Bank's finding number 17. This finding begins with a favorable finding for Motores, but under this sugar coating is an abundance of poison. We are perfectly content to let the drafts speak for themselves rather than take the Bank's legal conclusion of what they say. Again in this finding, there is an attempt to purify the corrupt

acts and conduct of the bankrupt, wholly unsupported by the evidence.

IX.

Objects to the conclusion of law in paragraph 6 of the Bank's proposed conclusions of law for the reason and upon [60] the ground that the Trustee in Bankruptcy is bound by the testimony referred to in conclusion number 6, irrespective of whether the Bank may be bound thereby.

Respectfully submitted,

JOHN L. MACE and

ERNEST R. UTLEY,

/s/ By ERNEST R. UTLEY,

Attorney for Motores de

Mexicali, S. A. [61]

[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The above-entitled matter came on regularly for hearing on August 13, 1953, at 2:00 p.m. before the Honorable Reuben G. Hunt, Referee in Bankruptcy, upon the petition of Bank of America National Trust and Savings Association to reclaim certain motor vehicles and monies from the Trustee in Bankruptcy, the Trustee's answer to said petition, and the answer, affirmative defense and cross-petition of Motores de Mexicali, S. A. The petitioner Bank of America National Trust and Sav-

ings Association, hereinafter called the Bank, appeared by its attorneys Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian; E. A. Lynch, Trustee in Bankruptcy, appeared by his attorneys Craig, Weller & Laugharn, appearing by C. E. H. McDonnell; and cross-petitioner Motores de Mexicali, S. A. appeared by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley. The matter came on for hearing on August 13, 1953, at 2:00 p.m. and [62] at 4:30 p.m. of said day the matter was continued to August 19, 1953, at 11:00 a.m. Oral and documentary evidence was offered by the parties and at the close of the testimony the Court ordered a transcript made and ordered the parties to submit written arguments in support of their respective positions. The cause was ordered submitted upon the filing of the last brief. The Referee, being fully advised, has heretofore made and filed on November 19, 1953, a memorandum opinion relative to title to the motor vehicles and their proceeds involved.

Now, Therefore, the Referee does hereby make the following

Findings of Fact

1. The voluntary petition in bankruptcy was filed by Erbel, Inc., doing business as Bi-Rite Auto Sales, on July 2, 1953, and on July 28, 1953, E. A. Lynch was appointed and qualified as Trustee in Bankruptcy of said Erbel, Inc.

2. On April 6, 1953, the bankrupt executed and

delivered to the Bank a trust receipt describing, among other vehicles, a 1951 Buick, Engine No. 65129114; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$5,755.00; that of said sum there remains a balance due the Bank on said trust receipt of \$1,200.00; that said vehicle was sold by the Trustee on or about August 14, 1953, for the sum of \$1,300.00; that said sum is now in possession of the Trustee, and constitutes the proceeds of said vehicle.

3. That on or about April 8, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing, among other vehicles, a 1950 Oldsmobile, Engine No. 8A357041H; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$1,137.00; that no part of said sum has been paid to the Bank and there remains due the Bank the sum of [63] \$1,137.00; that said vehicle was sold by the Trustee on or about August 14, 1953, for the sum of \$1,250.00; that said sum is now in possession of the Trustee, and constitutes the proceeds of said vehicle.

4. That on or about May 9, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing, among other vehicles, the following: a 1952 Buick, Engine No. 6674135, and a 1950 Chevrolet, Engine No. HAA702291; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$2,410.00; that no part of said sum has been paid to the Bank and there remains due the Bank the sum of \$2,410.00; that

the aforesaid 1952 Buick was sold to one Mays and the Trustee has realized from the sale of said Buick cash in the sum of \$2,041.00; that said Mays traded in on said 1952 Buick a 1947 Mercury, Engine No. 799A1626018; that said 1947 Mercury was sold by the Trustee for a cash realization of \$400.00; that the aforesaid 1950 Chevrolet was sold to one Barbara Cohen and the Trustee has realized from said sale the sum of \$1,341.32; that said sums aggregating \$3,782.32 are now in the possession of the Trustee, and constitute the proceeds of said vehicles.

5. That on or about May 19, 1953, the bankrupt executed and delivered to the Bank a trust receipt describing among other vehicles, a 1952 Chevrolet, Engine No. KAA49792 and a 1952 Chevrolet, Engine No. KAA14323; in reliance upon said trust receipt the Bank advanced to the bankrupt the sum of \$4,925.00; that of said sum there remains a balance due the Bank of \$2,136.00; that the vehicles were sold by the Trustee on August 14, 1953, for the sum of \$1,200.00 for the vehicle bearing Engine No. KAA49792, and \$1,150.00 for the vehicle bearing Engine No. KAA14323; that said sums aggregating [64] \$2,350.00 are now in possession of the Trustee, and constitute the proceeds of said vehicles.

6. That the Bank filed with the Secretary of State a statement of trust receipt financing on November 21, 1952.

7. That the bankrupt executed and delivered

to the Bank a trust receipt describing, among other vehicles, a 1948 Cadillac, Engine No. 486238723; that said vehicle was sold prior to bankruptcy by the representative of the Sheriff of Los Angeles County; that the proceeds of the sale of said vehicle in the sum of \$1,672.82 were paid to and are in the hands of the Trustee; that there is due and unpaid to the Bank upon said trust receipt the sum of \$1,614.00.

8. That from and after the execution of the trust receipts, possession of the vehicles described in Findings 2, 3, 4, 5 and 7 was held by the bankrupt pursuant to said trust receipts.

9. That Motores de Mexicali, S. A., hereinafter in these findings called Motores, delivered physical possession of the following-described vehicles to the bankrupt on or about the following dates:

1951 Buick, Engine No. 65129114, March 6,
1953

1950 Oldsmobile, Engine No. 8A357041H,
March 6, 1953

1952 Buick, Engine No. 6674135, April 2, 1953

1952 Chevrolet, Engine No. KAA49792, April 2,
1953

1952 Chevrolet, Engine No. KAA14323, April 2,
1953;

that at the same time possession of the aforesaid vehicles was delivered, Motores delivered to the bankrupt the Mexican registration papers and bills of sale pertaining thereto; that at the same time

possession was delivered, the bankrupt delivered to Motores drafts which did not contain the words "or order" drawn upon itself payable through Bank of America National Trust and Savings Association for the [65] purchase price of each of the vehicles.

10. That the purpose of Motores in delivering the Mexican registration papers and the bills of sale to the bankrupt simultaneously with the delivery of physical possession of the vehicles as specified in Finding 9 was to enable the bankrupt to include the vehicles in trust receipts to be issued to a financial institution in order to obtain advances of funds of loans upon the security of said trust receipts; that Motores knew at the time of delivery of the vehicles that the bankrupt contemplated executing trust receipts on said vehicles for the purpose of creating liens thereon; that Motores consented to the creation of such liens.

11. That the bankrupt, with the full knowledge and consent of Motores, used the aforesaid Mexican registration papers and bills of sale to obtain ownership certificates issued by the Department of Motor Vehicles of the State of California pertaining to each of said vehicles; that on or about the dates specified in Findings 2, 3, 4 and 5 the bankrupt delivered said California ownership certificates to the Bank simultaneously with its application for loans upon each of the vehicles and simultaneously with the execution of trust receipts describing said vehicles; that both Motores and the

bankrupt contemplated that California ownership certificates would be obtained and used for this purpose at the time the vehicles, the Mexican registration papers, and the bills of sale pertaining thereto were delivered by Motores to the bankrupt; that the Bank of America National Trust and Savings Association advanced monies to the bankrupt as set forth in Findings 2, 3, 4 and 5 in good faith in reliance upon the possession by the bankrupt of the vehicles and the possession by the bankrupt of the California ownership certificates showing title registered in the name of [66] the bankrupt; that the bankrupt could not have obtained the aforesaid California ownership certificates without delivering to the Department of Motor Vehicles the indicia of ownership delivered to the bankrupt by Motores.

12. That the Bank had no knowledge that Motores and the bankrupt intended the sales of the vehicles to be cash sales; that the Bank had no knowledge that the bankrupt made any representations to Motores that the drafts would be honored when presented; that the two drafts dated March 6, 1953, given by the bankrupt to Motores at the time the vehicles described in Findings 2 and 3 were delivered were dishonored by the bankrupt on March 18, 1953, and were returned unpaid to Motores' bank in Mexico on that date; that the aforesaid drafts were again forwarded for collection by Motores' bank to the Bank of America National Trust and Savings Association on March 28, 1953, and after being again dishonored were

returned to Motores' bank on May 19, 1953; that after the aforesaid two drafts had been returned to Motores' bank dishonored as aforesaid, Motores on April 2, 1953, delivered the 1952 Buick described in Finding 4 and the two 1952 Chevrolets described in Finding 5 to the bankrupt, taking, in return for the delivery of the vehicles and the title documents pertaining thereto, drafts similar in form to the aforesaid drafts dated March 6, 1953; that the three drafts pertaining to the latter three vehicles were forwarded for collection by the Mexican corporation's bank on April 6, 1953, and were returned unpaid to said bank on May 19, 1953.

13. That the bankrupt at the time it issued the **drafts** promised Motores that it would pay the drafts immediately upon presentment; the bankrupt intended to fulfill this promise at the time it was made; Motores relied upon this promise in parting with its title to the vehicles; the Bank had no knowledge of [67] this promise at any time.

14. Motores did not act with that degree of care reasonably to be expected of a seller of motor vehicles in the same or similar circumstances in that

(1) Motores failed, if it intended to sell only for cash, to obtain from the bankrupt cash or a certified or Cashier's Check;

(2) Motores failed to retain possession of the Mexican registration papers and the bills of sale until the drafts were honored; and

(3) Motores failed to attach to or enclose the

aforesaid Mexican registration papers and bills of sale as indicia of ownership with the drafts but instead delivered said indicia of ownership direct to the bankrupt, and forwarded the drafts with blank pieces of paper enclosed.

15. Since the bankrupt had possession of the vehicles and the indicia of ownership thereto, the Bank, if it had investigated, would be reasonably justified in concluding that the bankrupt had sufficient title to enable it to give a first lien upon the vehicles and that the bankrupt's title to the vehicles was not dependent upon the payment of the drafts; the Bank had no reason to believe and was not in the possession of any facts indicating that Motores and the bankrupt intended the sales to be sales for cash.

16. Prior to May 19, 1953, the officer of the Bank in charge of making the advances described in Findings 2, 3, 4 and 5 had no actual knowledge that the drafts given by the bankrupt to Motores were unpaid at the time the advances were made; upon the facts within the knowledge of the Bank at the time the aforesaid advances were made the Bank was justified in proceeding upon the basis that title had passed to the bankrupt and that Motores extended [68] credit to the bankrupt for the amount of the purchase price.

17. As between Motores and the bankrupt it was intended that the sales be sales for cash; Motores sold and delivered the vehicles and the title documents pertaining thereto to the bankrupt in

return for drafts drawn on the bankrupt which drafts specified that they could be forwarded for collection through Bank of America National Trust and Savings Association; the bankrupt represented to Motores that the drafts would be paid promptly the same as a check; the aforesaid promise was not kept but the bankrupt intended to fulfill said promise at the time it was made; Motores never gave any notice of rescission to anyone prior to the filing of its answer and cross-petition on August 13, 1953, in this proceeding; the language of the drafts themselves indicated no intention on the part of Motores or the bankrupt that title to the vehicles was to be retained by Motores until the drafts were paid, and the presence of an unpaid draft at the Bank did not constitute notice to the Bank of any defect in the title to the vehicles; the said unpaid drafts were not brought to the attention of any officer of the Bank until after all of the advances referred to in Findings 2, 3, 4 and 5 had been made by the Bank.

Based upon the foregoing Findings of Fact the Court makes the following

Conclusions of Law

1. Motores de Mexicali, S. A. is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank of America National Trust and Savings Association.

2. The Bank of America had a valid lien upon the vehicles and now has a valid lien upon the

proceeds thereof in the hands of the Trustee as follows: [69]

Vehicle	Engine No.	Amount of Bank's Lien	Net Amount Due Bank after Deduction of Bank's Share of Expenses
			of Sale
1951 Buick	65129114	\$1200.00	\$1140.00
1950 Oldsmobile	8A357041H	1137.00	1080.75
1952 Chevrolet	KAA49792	1068.00	1011.60
1952 Chevrolet	KAA14343	1068.00	1014.52
1948 Cadillac	486328723	1614.00	1614.00
1952 Buick	66741345	2410.00	2402.00
1950 Chevrolet	HAA702291		
1947 Mercury	799A1626018		
Aggregating		\$8497.00	\$8262.87

3. The Trustee is entitled to deduct from the Bank's share of the proceeds that portion of his reasonable expenses of sale allocable to said share as follows:

Vehicle	Engine No.	Reasonable Expenses of Sale
1951 Buick.....	65129114	\$ 60.00
1950 Oldsmobile.....	8A357041H	56.25
1952 Chevrolet.....	KAA49792	56.40
1952 Chevrolet.....	KAA14343	53.48
1947 Mercury.....	799A1626018	8.00
Aggregating		\$234.13

4. As between Motores de Mexicali, S.A. and E. A. Lynch, Trustee in Bankruptcy, Motores de Mexicali is entitled to recover of the Trustee the surplus realized by the Trustee from the sale of the following-described vehicles in amounts shown below less that portion of the Trustee's reasonable expenses of sale in the amounts shown below: [70]

Vehicle	Engine No.	Gross Amount of Surplus plus Due Motores de Mexicali, S.A.	Motores' Portion of Trustee's Reasonable Expenses of Sale	Net Amount Due Motores de Mexicali
1951 Buick	65129114	\$100.00	\$ 5.00	\$ 95.00
1950 Oldsmobile	8A357041H	113.00	6.25	106.75
1952 Chevrolet	KAA49792	132.00	6.60	125.40
1952 Chevrolet	KAA14343	82.00	4.02	77.98
1952 Buick	66741345) 1372.32	12.00	1360.32
1947 Mercury	799A1626018			
Aggregating		\$1799.32	\$33.87	\$1765.45

5. The Bank is not entitled to interest after the date of bankruptcy.

6. The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned.

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed:

1. That E. A. Lynch, Trustee, pay over to Bank of America National Trust and Savings Association the sum of \$8262.87.

2. That E. A. Lynch, Trustee, pay over to Motores de Mexicali, S. A. the sum of \$1765.45.

3. That E. A. Lynch, Trustee, retain the balance of the impounded fund in the sum of \$326.82 as a part of the Estate herein.

4. That no interest be allowed to either Bank of [71] America National Trust and Savings Association or Motores de Mexicali, S. A.

5. That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted.

Dated this 27th day of January, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy. [72]

[Endorsed]: Filed January 27, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

Comes now your petitioner, Motores de Mexicali, S. A., a corporation of the United States of Mexico, the claimant and a creditor herein, and petitions for a review of the order made and entered herein on the 27th day of January, 1954, entitled "Findings of Fact, Conclusions of Law, and Order", and respectfully shows:

I.

That your petitioner is the claimant and a creditor herein and an interested party to the within proceeding.

II.

That Motores de Mexicali, S. A., a corporation

of the United States of Mexico will hereinafter be referred to as Motores and the Bank of America National Trust & Savings Association will hereinafter be referred to as the Bank.

III.

That on or about the 29th day of July, 1953, a petition was filed by the Bank to reclaim certain automobiles therein described and for an order directing the trustee to abandon certain [74] motor vehicles described in Schedule A attached to said petition, and to pay over to the Bank certain moneys derived from the sale of the motor vehicles described in Schedule B attached to said petition. On the basis of said petition, an order to show cause was issued directing the trustee in the above entitled bankruptcy estate to show cause why said petition should not be granted and said order to show cause was noticed for hearing and argument on August 13, 1953, at 10 a.m. on said day.

IV.

In response to said petition for reclamation, an answer and cross-petition was filed by Motores, the claimant herein, praying for the following cross-relief:

a. That said Motores is the owner of and entitled to immediate possession of the automobiles described in said cross-petition and that the trustee deliver possession thereof to said cross-petitioner.

b. That the Court determine that the Bank has no valid pledge, mortgage, claim or lien upon said

automobiles or any of them, under the trust receipt certificates alleged in the reclamation petition of the Bank, and

c. That in the event the trustee cannot deliver said automobiles to cross-petitioner in their original form and is in position to deliver said property in a modified form, that the trustee be required so to do.

V.

That a hearing on said petition for reclamation, the trustee's answer thereto, and on the aforesaid cross-petition was originally noticed on August 13, 1953, at 2 p.m. before the above entitled Court. The petitioner, the Bank, appeared by its attorney, Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian; E. A. Lynch, Trustee in Bankruptcy, appeared by his attorneys Craig, Weller & Laugharn, [75] appearing by C. E. H. McDonnell; and cross-petitioner and claimant herein, Motores, appeared by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley. The matter came on for hearing on said date and was continued to August 19, 1953, at 10 a.m. Oral and documentary evidence was offered by the parties and at the close of the testimony the Court ordered a transcript made and ordered the parties to submit written arguments in support of their respective positions. The cause was ordered submitted upon the filing of the last brief.

VI.

The Referee, being fully advised, made and filed

on November 19, 1953, a Memorandum Opinion relative to title to the motor vehicles and their proceeds involved, and on January 27, 1954, made and filed its Findings of Fact, Conclusions of Law, and Order, granting relief to the Bank as prayed for in its petition for reclamation and granting relief to Motores against the trustee but denying relief to Motores against the Bank as prayed for in its cross-petition.

VII.

That objections were filed by Motores in this action on or about January 14, 1954, to the proposed findings, and Motores offered proposed findings of fact, conclusions of law and order, which objections and proposed findings were rejected by the Court as appears from the files and records herein.

VIII.

Petitioner contends that the findings are contradictory and are not sustained by the record and also that said findings are interspersed with conclusions of law and are in a large measure argumentative, and that the Court specifically erred in the following respects:

1. That this Honorable Court erred in finding (Finding No. 2) that the Bank advanced to the bankrupt the moneys therein set forth [76] in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on April 6, 1953.

2. That this Honorable Court erred in finding (Finding No. 3) that the Bank advanced to the

bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on April 8, 1953.

3. That this Honorable Court erred in finding (Finding No. 4) that the Bank advanced to the bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by (Finding No. 5) that the Bank advanced to the the bankrupt to the Bank on May 9, 1954.

4. That this Honorable Court erred in finding bankrupt the moneys therein set forth in reliance upon the trust receipt executed and delivered by the bankrupt to the Bank on May 19, 1953.

5. That this Honorable Court erred in finding (Finding No. 8) that possession of the vehicles therein referred to was held by the bankrupt pursuant to trust receipts therein set forth.

6. That this Honorable Court erred in finding (Finding No. 10) that Motores delivered the Mexican registration papers and bills of sale to the bankrupt in order to enable the bankrupt to include the vehicles in the trust receipts issued by the Bank and in order to obtain loans upon the security of said trust receipts.

The Court further erred in finding that Motores consented to the creation of liens in favor of the Bank in derogation of its proprietary rights in and to said vehicles.

7. That this Honorable Court erred in finding (Finding No. 11) that Motores consented to and

had knowledge that the Mexican registration papers and bills of sale therein referred to were to be used by the bankrupt for the purpose of creating liens in favor of the Bank in derogation of the proprietary rights of Motores in and to the vehicles therein referred to.

The Court further erred in finding that the loans made by [77] the Bank to the bankrupt were had in reliance upon the possession of the bankrupt of said vehicles and upon reliance of the bankrupt's indicia of ownership in and to said vehicles.

8. That this Honorable Court erred in finding (Finding No. 12) that the Bank had no knowledge that the sales by Motores to the bankrupt of the vehicles therein referred to were cash sales and that the Bank had no knowledge that the bankrupt made representations to Motores that the purchase money drafts issued by the bankrupt to Motores for said vehicles would be paid upon presentment.

9. That this Honorable Court erred in finding (Finding No. 13) that the bankrupt at the time it issued the drafts, intended to fulfill its promise to Motores that the drafts would be paid immediately upon presentation, at the time said promise was made.

The Court further erred in finding that the Bank had no knowledge of the bankrupt's promise to honor said purchase money drafts upon their presentment.

10. That this Honorable Court erred in finding

(Finding No. 14) that Motores' did not act with that degree of care reasonably to be expected of a seller of motor vehicles in the same or similar circumstances as set forth in said finding.

The Court further erred in finding that the particularized circumstances set forth in said finding constituted factual and legal negligence on the part of Motores or lack of business care.

11. That this Honorable Court erred in finding (Finding No. 15) that the bankrupt had the indicia of ownership in and to said vehicles and that the Bank was reasonably justified in concluding that the bankrupt had sufficient title to enable the bankrupt to give a first lien upon the vehicles in derogation of the proprietary rights of Motores.

The Court erred in finding that the bankrupt's title to the vehicles was not dependent upon the payments of the drafts, [78] and that the Bank had no reason to believe and was not in possession of any facts indicating that Motores and the bankrupt intended the sales to be sales for cash.

12. That the Honorable Court erred in finding (Finding No. 16) that the credit officer of the bank had no knowledge, prior to May 19, 1953, that the purchase money drafts issued and delivered by the bankrupt to Motores were unpaid at the time the loans were made by the Bank to the bankrupt.

The Court further erred in finding that the Bank had no knowledge that said purchase money drafts were unpaid at the time the loans were made by it to the bankrupt and that the Bank was justified

in making the loans on the premise that the registration certificates, under the facts in the record, amounted to indicia of ownership and that Motores extended credit to the bankrupt for the amount of the purchase price of said vehicles.

13. That this Honorable Court erred in finding (Finding No. 17) that the bankrupt intended to pay said drafts at the time it issued and delivered them to Motores.

The Court further erred in finding that non-payment of the drafts were never called to the attention of the Bank at the time the loans were made by it to the bankrupt as stated in said finding.

14. That this Honorable Court erred in its conclusion of law (No. 1) that Motores is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank.

15. That this Honorable Court erred in failing to make the following conclusions of law:

a. That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price for said vehicles were all concurrent conditions [79] and mutually dependent acts, and the transaction not only between Motores and the bankrupt but also between Motores and the Bank was a cash transaction.

b. That the bankrupt's drafts (Exhibits A, B, C, D, and E) constituted only a conditional payment of the purchase price. The failure of the

bankrupt to have said drafts honored and paid upon their presentation to the Bank for payment has vitiated the sale transaction ipso facto and ab initio, irrespective of the bankrupt's pretended honest intentions when the drafts were issued. The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in specie.

c. That the provisions of the Negotiable Instruments Act as well as the provisions of the Sales Act must be considered. Therefore, where a check or draft given by the buyer to the seller for the purchase price is unpaid upon presentation in due course of business, there is no sale, and the title to the property is revested in the seller by operation of law, and no rescission is required to enable the seller to have restitution of his own property.

d. That when a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

f. That the Bank was not a bona fide purchaser of the vehicles, it stood in the shoes of the bankrupt, and the Bank could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the Bank had no lien on the vehicles.

g. That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an

estoppel on the part of Motores against the Bank. That the drafts were deposited by Motores in [80] the regular course of business, that the Bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon revested in Motores. That the flooring financing of the bankrupt contemplated and included the payment of the drafts, and that the flooring financing and the payment of the drafts all constituted a part and parcel of the same transaction, and that the Bank was charged with knowledge thereof.

h. That the Court erred in not concluding as a matter of law that the Bank was charged with notice and put upon inquiry because of the fact that unpaid drafts were in its possession at the time it advanced money upon its flooring contract agreements.

16. That the findings of the Court are contrary to and in conflict with the evidence in the case.

17. That the conclusions of law made by the Court are contrary to the law of the case.

18. That the order of the Court granting relief to the Bank is contrary to the law and the evidence.

19. That the Court erred in sustaining objection to certain evidence offered by Motores and in overruling certain objections made to evidence offered by the Bank.

Wherefore, petitioner, feeling aggrieved because of the order hereinabove referred to, prays that the same be reviewed as provided by Section 39-c

of the Bankruptcy Act; that said order be reversed; that petitioner be adjudged to have title to the vehicles set forth in the cross-petition of Motores, and in and to the proceeds derived from the sale of said vehicles. That the Honorable Reuben G. Hunt, Referee in Bankruptcy, prepare his Certificate of Review and attach thereto the following:

1. Order of Adjudication. (Need not be attached but reference made to same in Clerk's file.)

2. Transcript of reporter of all the evidence taken upon the [81] hearing on the petition, answers, and cross-petition hereinabove referred to, including transcript at hearing on objections to findings.

3. All exhibits admitted in evidence upon the hearing on the petition, answers, and cross-petition hereinabove referred to.

4. Petition to Reclaim Property—filed July 29, 1953.

5. Order to Show Cause re Petition.

6. Answer of Trustee to petition to reclaim property.

7. Answer, Affirmative Defense and cross-petition of Motores.

8. Memorandum Opinion relative to title to certain motor vehicles or their proceeds.

9. Objections to proposed findings of fact and conclusions of law.

10. Proposed findings of fact and conclusions of law offered by Motores.

11. Findings of Fact, Conclusions of Law, and Order, dated January 27, 1954.

12. Petition for Review.

Respectfully submitted,

JOHN L. MACE and
ERNEST R. UTLEY,

/s/ By ERNEST R. UTLEY,
Attorneys for Motores de
Mexicali, S. A. [82]

Duly Verified. [83]

Affidavit of Service by Mail attached. [84]

[Endorsed]: Filed February 6, 1954.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

Of Referee's Order Relative to Answer and Cross
Petition of Motores de Mexicali, S. A., a Cor-
poration of the United States of Mexico, to
Petition of Bank of America to Reclaim Cer-
tain Autos and for an Order Directing the
Trustee to Abandon Other Autos to Said Bank
and to Pay Over to the Bank Monies Derived
from the Sale of Still Other Autos.

Craig, Weller and Laugharn, Attorneys for
Trustee.

John L. Mace and Ernest R. Utley, Attorneys for
Motores de Mexicali, S. A.

Hugo A. Steinmeyer, Robert H. Fabian and Rob-
ert Van Buskirk, Attorneys for Bank of America
National Trust and Savings Association. [85]

I.—Statement of the Case

This is covered in the Referee's Memorandum Opinion up to the point where it was filed, Nov. 19, 1953. This opinion accompanies this certificate. Findings of Fact, Conclusions of Law and Order were signed, filed and entered herein on Jan. 27, 1954. Thereafter, and on Feb. 6, 1954, Motores de Mexicali, S. A., filed herein its petition for a review of said order of Jan. 27, 1954.

II.—Questions Presented

These are also set forth in said Memorandum Opinion.

III.—Comments on the Evidence and the Law

This is also set forth in the Memorandum Opinion.

IV.—Findings of Fact and Conclusions of Law

These are also set forth in the order entered herein on Jan. 27, 1954.

V.—Deficiencies in Petition for Review

It will be noted in the petition for review that the errors alleged therein are set forth in general terms only. Bankruptcy Act Sec. 39c provides that the petition for review shall set forth the order complained of and the alleged errors in respect thereto. It is thought that it is improper practice to allege that a finding is not supported by the evidence, without showing wherein such finding is not so supported. A substance of the evidence on the subject should be stated so the reviewing court may determine whether or not there is any substantial

support for the particular finding. It is also thought that it is improper [86] practice to allege that errors of law, such as conclusions of law, have been committed without stating why the same are against the law. The Court's attention in this respect is called to the following cases: in re Florsheim, D.C. Cal., 38 A.B.R.(N.S.) 142, 24 F.S. 991, and the Ninth Circuit cases cited therein. In re Musgrave, N.D. W.Va. 40 A.B.R. (N.S.) 683, 27 F.S. 341; in re Fineman, D.C. Md. 42 A.B.R. (N.S.) 566, 32 F.S. 212.

This situation is summed up in the following statement of the Court in the case of *Virginian Ry. vs. Chambers* (C.C.A. 4th Cir.), 46 F.(2d) 20, the Court said:

"This court cannot undertake to sift the evidence and endeavor to discover an error, simply because the plaintiff has assigned error in general terms."

Furthermore, it seems only fair that the respondent on review should be apprised of the basis and reasons for the errors charged in the petition for review so he may have ample opportunity to prepare his defense.

It is also suggested that the labor of the reviewing court would be much lessened if the practice indicated herein respecting petitions for review was insisted upon.

VI.—Documents Accompanying This Certificate

1. Petition to Reclaim Property, filed July 29, 1953.

2. Answer, Affirmative Defense and Cross Peti-

tion of Motores de Mexicali, S. A., a corporation of the United States of Mexico, filed Aug. 13, 1953.

3. Answer of Trustee in Bankruptcy to Order to Show Cause filed Aug. 13, 1953.

4. Stipulation filed Aug. 18, 1953. [87]

5. Reporter's Transcript of Proceedings on Order to Show Cause, filed Aug. 19, 1953.

6. Petition to Abandon Burdensome Assets and Order thereon, filed Aug. 21, 1953.

7. Statement of Disposition of Cars Under Reclamation by Bank of America and/or Motores de Mexicali, filed Aug. 26, 1953.

8. Stipulation to Impound Funds and Release Title pending further Order of Court, filed Sept. 2, 1953.

9. Memorandum Opinion relative to title of Certain Motor Vehicles or their Proceeds, filed Nov. 19, 1953.

10. Objections to Proposed Findings of Fact and Conclusions of Law offered by the Bank of America National Trust & Savings Association, filed Jan. 14, 1954.

11. Findings of Fact, Conclusions of Law and Order filed Jan. 27, 1954.

12. Petition filed Feb. 6, 1954, for a review of Referee's Order of Jan. 27, 1954.

13. All Exhibits Received in Evidence.

Dated: Feb. 8, 1954.

/s/ REUBEN G. HUNT,

Referee in Bankruptcy [88]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
PETITION FOR REVIEW

To Motores de Mexicali, S. A., and to John L. Mace and Ernest R. Utley, Its Attorneys; to E. A. Lynch, Trustee in Bankruptcy of Erbel, Inc., dba Bi-Rite Auto Sales, and to Craig, Weller & Laugharn, His Attorneys:

Please Take Notice That the respondent on review Bank of America National Trust and Savings Association will on March 22, 1954, at 9:45 a.m., in the Courtroom of the Honorable Wm. M. Byrne, United States District Judge, in the United States Courthouse in Los Angeles, California, move the Court to dismiss the petition of Motores de Mexicali, S. A., filed February 6, 1954, for review of the Referee's order of January 27, 1954, in the above-entitled case upon the ground that the said petition for review fails to comply with Section 39c of the Bankruptcy Act in that it fails to set forth the alleged errors in the order complained of, with sufficient particularity.

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
ROBERT VAN BUSKIRK,

/s/ By ROBERT H. FABIAN,
Attorneys for Respondent on Review, Bank of
America N. T. & S. A. [89]

Affidavit of Service by Mail attached. [90]
[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 22, 1954. At Los Angeles, Calif.

Present: Hon. Wm. M. Byrne, District Judge;
Deputy Clerk: Edw. F. Drew; Reporter: Thos.
Goodwill.

Counsel for Bank of America: Robert Fabian;
Counsel for Motores de Mexicali, S. A.: Ernest R.
Uteley; Counsel for Trustee E. A. Lynch: C. E. H.
McDowell.

Proceedings: For hearing (1) motion of Bank
of America to dismiss petition for review; (2) peti-
tion of Motores de Mexicali, S.A., for review of
Referee's order, filed Jan. 27, 1954.

Counsel make statements and stipulate that mo-
tions be submitted without oral argument.

Court makes a statement.

It Is Ordered that said motions be submitted.

EDMUND L. SMITH,
Clerk,

/s/ By EDW. F. DREW,
Deputy Clerk

[91]

In the United States District Court for the Southern District of California, Central Division

In Proceedings No. 57,280-WB

In the Matter of ERBEL, INC., dba BI-RITE AUTO SALES, Bankrupt.

ORDER DENYING PETITION FOR REVIEW

The above matter came on for hearing on March 22, 1954, upon the petition of Motores de Mexicali, S. A., to review an order of the Honorable Reuben G. Hunt, Referee in Bankruptcy, entered January 27, 1954. The said order of the Referee was made upon the petition of the Bank of America National Trust and Savings Association to reclaim certain motor vehicles and monies from the Trustee in Bankruptcy, the Trustee's answer to said petition to reclaim, and the answer, affirmative defense and cross-petition of Motores de Mexicali, S. A. The petitioner-on-review, Motores de Mexicali, S. A., was represented by its attorneys Ernest R. Utley and John L. Mace, appearing by Ernest R. Utley, and the respondent-on-review, Bank of America National Trust and Savings Association, was represented by its attorneys Hugo A. Steinmeyer, Robert H. Fabian and Robert Van Buskirk, appearing by Robert H. Fabian.

The parties having filed points and authorities setting forth their arguments and having waived oral argument, the matter [92] was ordered submitted to the Court for its decision on March 22, 1954, and the Court, being fully advised, has here-

tofore on April 14, 1954, announced its decision that the order of the Referee of January 27, 1954, be affirmed;

Now, Therefore, the Court hereby adopts the Findings of Fact and Conclusions of Law of the Referee made January 27, 1954, and

It Is Hereby Ordered, Adjudged and Decreed That the petition of Motores de Mexicali, S. A., for review of the aforesaid order of the Referee of January 27, 1954, be denied, and

It Is Further Ordered, Adjudged and Decreed That the order of the Referee dated January 27, 1954, be and it hereby is affirmed.

Dated this 29 day of April, 1954.

/s/ WM. M. BYRNE,

United States District Judge [93]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Judgment Filed and Entered April 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Motores de Mexicali, S. A., a corporation of the United States of Mexico, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, made and entered

on April 29, 1954, adopting and affirming the order of the Referee made and entered in this proceeding on January 27, 1954, and denying the petition of said Motores de Mexicali, S. A., for a review of the aforesaid order of the Referee.

Dated this 19th day of May, 1954.

/s/ ERNEST R. UTLEY,

Attorney for Appellant

[95]

Affidavit of Service by Mail attached.

[96]

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 102, inclusive, contain the original Petition in Bankruptcy; Orders of Adjudication and of General Reference; Petition to Reclaim Property; Answer, Affirmative Defenses and Cross-Petition of Motores de Mexicali, S.A.; Answer to Order to Show Cause; Stipulation; Petition to Abandon Burdensome Assets and Other Thereon; Statement of Disposition of Cars Under Reclamation by Bank of America and/or Motores de Mexicali; Stipulation to Impound Funds and Release Titles Pending Further Order of Court; Memorandum Opinion Relative to Title to Certain Motor

Vehicles or Their Proceeds; Objections to Proposed Findings of Fact, Conclusions of Law Offered by Bank of America; Findings of Fact, Conclusions of Law and Order of Referee; Petition for Review; Certificate on Review; Motion to Dismiss Petition for Review; Order Denying Petition for Review; Notice of Appeal and Two Designations of Record on Appeal and a full, true and correct copy of Minutes of the Court for March 22, 1954 which, together with Reporter's Transcript of Proceedings on Order to Show Cause on August 13, 1953 and the Original Exhibits Before the Referee in Bankruptcy, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17 day of June, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy—No. 57,280-WB.

In the Matter of ERBEL, INC., dba BI-RITE AUTO SALES, Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Thursday, Aug. 13, 1953, at 2:00 o'clock p.m.

Before the Honorable Hugh L. Dickson, Referee in Bankruptcy; the Honorable Reuben G. Hunt, Referee in Bankruptcy, Presiding.

Appearances: For the Trustee: Craig Weller & Laugharn, by C. E. H. McDonnell, Esq. For Motores de Mexicali, S.A., a corporation of the United States of Mexico: Ernest R. Utley, Esq. For Bank of America: Robert H. Fabian, Esq. [1*]

* * * * *

E. A. REDFERN

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. McDonnell): Mr. Redfern, are you the adjuster for Mr. E. A. Lynch, the Trustee in this matter? A. I am.

Q. And are you generally familiar with the transactions in the administration of the estate?

A. Yes.

Q. As far as you know, the Sheriff was in pos-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of E. A. Redfern.)

session, was he not, when the Receiver took over?

A. That is right.

Q. And did you arrange to pick up any money or any property from the Sheriff?

A. Yes, sir.

Q. What did you pick up from him in the way of cash, checks and conditional sales contracts?

A. We got a check from the Sheriff for \$4,954.93.

Mr. Utley: Four thousand and what?

The Witness: \$4,954.93.

Q. (By Mr. McDonnell): Did you receive any uncashed checks, that is any checks that the Sheriff had taken in? A. No.

Q. Did you receive any conditional sales contracts on any automobiles sold while the Sheriff was in possession?

A. Well, those were got from BiRite, not from the Sheriff.

Q. You mean conditional sales contracts that arose while the Sheriff was in charge?

A. That is right.

Q. Did any of those cover the Zimmerman, the Mays or the Cohen automobiles? A. Yes.

Q. Which one was that? [14]

A. Well, I have those three contracts right here.

Q. I see; and you have not discounted them? We still have them in our possession; is that correct? A. Yes, we still have them.

Q. And what are the amounts of the respective contracts?

(Testimony of E. A. Redfern.)

The Referee: I am more interested in this: Did the Sheriff give you an itemized statement of what that cash consisted of, how he got that?

The Witness: We have a more or less itemized statement but it doesn't show any names from where the money came on that, on the Sheriff's statement. However,——

Mr. Fabian: Mr. Redfern, I want to direct your attention to this statement made by the Sheriff.

The Witness: That is a statement by the keeper of what he turned over to the Sheriff.

The Referee: And what does that show as far as the cars are concerned that we are interested in?

The Witness: It shows a 1948 Cadillac, License No. 1S67865, and it shows that he got \$1,672.82.

Mr. Fabian: In the form of——

The Witness: It looks like a Bank of America, Melrose and La Brea, check.

Mr. Fabian: And the number?

The Witness: Check No. 17E.

Mr. Fabian: And the date? [15]

The Witness: And the date is 6-17-53.

The Referee: All right, go ahead and give us the rest of it.

The Witness: The other one is Rudolph Mays, a Bank of America Check No. 5675, drawn on the Washington and Vermont Branch on 6-19-53, in the amount of \$125.

Q. (By Mr. McDonnell): Are there any other Mays funds that are marked on that keeper's record, Mr. Redfern?

(Testimony of E. A. Redfern.)

A. Yes. There is Check No. 3222, Bank of America, Western and Santa Monica Branch, \$450, on a 1952 Buick.

Mr. Utley: What is the date of that check?

The Witness: 6-24-53.

Mr. Utley: What does that show—does that show what car that was?

The Witness: A 1952 Buick.

Mr. Utley: Give the number of it?

The Witness: License No.—there is no motor number on it.

Mr. Utley: What is the license number?

The Witness: IY61107.

Mr. Utley: Now, that is the car that I am interested in.

The Witness: That is right.

The Referee: I see.

Mr. Utley: Is there a contract on that Buick also, Mr. Redfern? [16]

The Witness: Yes, there is a contract here.

Mr. Utley: What is the amount of the contract?

The Witness: The amount of the contract?

Mr. Utley: Yes.

The Witness: The original purchase price was \$2,595, sales tax of \$90.83, \$1 for the transfer of license, making a total of \$2,686.83, on which there was a trade-in apparently for \$450, credit.

Mr. Utley: That is probably that \$450 check item.

Mr. Fabian: Yes.

The Witness: Yes, and there is \$195.83, which

(Testimony of E. A. Redfern.)

I think is the pay-off, but they gave him credit here for \$541. It left an unpaid balance of \$1,500.

Now, in regard to that, I believe that the—there were two checks, one check of \$100—

Mr. Fabian: No, no, they are the same checks.

The Witness: What is this here (indicating)?

Mr. Fabian: Apparently that is the amount that was applied on the receipt that the Sheriff took. In other words, they only gave him credit for \$541.

The Witness: Yes. They gave him credit for \$541, and it looks like we got the money.

Mr. Fabian: And you got the money?

The Witness: It looks like it, doesn't it?

Mr. Fabian: Yes.

The Witness: Yes. [17]

Mr. Fabian: The Trustee received the \$541 that Mr. Mays paid in in cash; is that correct?

The Witness: Yes.

Mr. Fabian: All right, now let's take the Cohen automobile.

The Witness: We got \$407.16, a Bank of America check, Check No. 22790, from Barbara Cohen, on a 1950 Chevrolet, License No. 1Y61111. There is a balance due on the contract of \$934.16, and we still hold the contract.

Q. (By Mr. McDonnell): \$934.16, the balance due on the contract? A. Yes.

The Referee: Let me get this clear in my mind. There are three cars the Sheriff sold; is that right?

The Witness: Yes, sir.

(Testimony of E. A. Redfern.)

The Referee: And just how much cash came from each car—for each car from the Sheriff, that is now in the Trustee's hands or was in his hands at one time?

The Witness: Well, on the Zimmerman car there was \$1,672.82.

The Referee: All right. Now, the next car?

The Witness: On the Mays car there was \$541.

The Referee: And the third car?

The Witness: On the Cohen car there was \$407.16.

The Referee: Now, what is the total of that?

The Witness: Well, sir, I will have to add it up.

The Referee: If you don't mind just adding it.

The Witness: My figures make it \$2,620.98.

Mr. Fabian: That is correct.

The Referee: Any further questions of this witness?

Q. (By Mr. McDonnell): Do your records show that other automobiles other than these three were sold, Mr. Redfern, and proceeds, some proceeds of the sale in cash came into the hands of the Sheriff and was passed on to you?

A. Yes.

The Referee: What has that got to do with these three?

Mr. McDonnell: I want to make my record.

The Referee: All right, but I'm entitled to know what your purpose is.

Mr. McDonnell: My purpose, as I stated before, is to prove that there was one fund of money

(Testimony of E. A. Redfern.)

that came into the hands of the Trustee and it was not broken down at all as to these three cars.

The Referee: That is not important at all. I don't get your point at all. What is it? We have traced this money into the hands of the Trustee. What is your point?

Mr. McDonnell: I don't think that constitutes tracing.

The Referee: I do.

Mr. McDonnell: That is my point, with all due respect to the Court. [19]

The Referee: What is your point? You haven't made it clear yet.

Mr. McDonnell: My point in brief is this, that to prevail on a trust fund theory they must be able to identify the specific dollars.

The Referee: Haven't they done that here?

Mr. McDonnell: No.

The Referee: Why not?

Mr. McDonnell: Because we have a conglomerate fund, a group of dollars.

The Referee: You can't take four thousand silver dollars and say, "This is it."

Mr. McDonnell: Precisely.

The Referee: The Sheriff got certain money for the cars and turned it over. What is wrong with that?

Mr. McDonnell: Obviously the very difficulty your Honor pointed out is the difficulty that all trust fund claimants face, they cannot trace the funds.

(Testimony of E. A. Redfern.)

The Referee: Is that your point, that they must trace the dollars?

Mr. McDonnell: Unfortunately that is the state of the law, I think.

The Referee: I'll rule against you.

Mr. McDonnell: Well, that is your Honor's prerogative.

Mr. Fabian: In view of Mr. McDonnell's position, [20] your Honor, I think these records ought to go into evidence. I don't like to clutter up the record but I think that they ought to go in.

The Referee: Won't that be unintelligible to a reviewing court?

Mr. Fabian: No, I don't think so.

The Referee: If we have a statement from Mr. Redfern how much money was received from the Sheriff and what it covered, won't that be sufficient?

Mr. Fabian: I think so, but I don't want my record to be insufficient here when I have the document here.

The Referee: Why not have Mr. Redfern prepare a statement of the total amount received and what it is composed of?

Mr. Fabian: The statement is here. That is what I would propose to put in evidence.

The Referee: Oh, I thought you meant all those other papers.

Mr. Fabian: No—that one, plus——

The Referee: There must be another one there.

(Testimony of E. A. Redfern.)

Mr. Fabian: There is another one—with the receipts attached.

The Referee: Well, I thought Mr. Redfern gave us a figure of some \$4,000.

Mr. Fabian: That is the other statement that ties back—— [21]

The Referee: Oh, that is another one. Any objection to these going in evidence?

Mr. McDonnell: I haven't seen them.

Mr. Utley: I have no objection.

The Referee: Well, you want to see the money identified, don't you?

Mr. Utley: On one of them, yes, but I am satisfied with the identification already.

Mr. Fabian: This should go with that (indicating).

The Referee: Hand it to Mr. McDonnell, will you?

Mr. Fabian: All right.

Mr. McDonnell: All these documents are going in, are they, Mr. Fabian?

Mr. Fabian: Yes.

Mr. McDonnell: Fine. I have no objection.

The Referee: All right, they will be received in evidence as Bank of America's Exhibit No. 1.

Mr. Fabian: Do you have any further questions, Mr. McDonnell?

Mr. McDonnell: No, I have no further questions.

(Testimony of E. A. Redfern.)

Cross Examination

Q. (By Mr. Fabian): Mr. Redfern, with respect to the Mays automobile, did you also take over as the representative of the Trustee a 1947 Mercury automobile that was traded by Mr. Mays in connection with his purchase of the Buick? [22]

A. We have a 1947 Mercury 8.

Q. Will you give the motor number?

A. Motor No. 799A1626018.

Q. Do your records show how BiRite acquired that vehicle?

A. Well, the envelope here shows purchased from Rudolph A. Mays, 2235 West 27th Street, Los Angeles.

Q. Is that the envelope that pertains to the sale of the 1952 Buick Riviera to Mr. Mays?

A. Not the same envelope, Mr. Fabian, no, sir. However, the number of this envelope is 670. On the car that Mr. Rudolph Mays bought, the Buick, it says, "Trade-in, Stock No. 670, \$450."

Q. And "Stock No. 670" is the 1947 Mercury?

A. Is the 1947 Mercury.

Q. The 1947 Mercury is in your inventory, isn't it?

A. Yes, sir.

Mr. McDonnell: I will offer to stipulate on behalf of the Trustee—I don't know to whom the 1947 Mercury will eventually belong, but it will not belong to the estate, and that is an item which the Trustee views as traceable since it can be identified.

Mr. Utley: Well, I think I have traced it.

(Testimony of E. A. Redfern.)

The Referee: Whenever I see a dollar I certainly can identify it.

Q. (By Mr. Fabian): Now, Mr. Redfern, I believe you [23] have testified as to the conditional sales contracts you have in your hands there are only two, is that correct, one on the Barbara Cohen automobile and the other one on the Rudolph Mays automobile?

A. Also the Zimmerman.

Q. Well, the Zimmerman I understand was a cash transaction, was it not? A. Oh, yes.

Q. There is no conditional sales contract on that?

A. No, sir. That was a cash deal apparently.

Q. So you have two conditional sales contracts, one on each of those——

A. One on Barbara and Carl Cohen.

Q. Covering a 1950 Chevrolet?

A. Covering a 1950 Chevrolet.

Q. Can you give the motor number of that vehicle, please? A. Yes; HAA702291.

Q. And you also have a conditional sales contract on the 1952 Buick Riviera, Engine No. 66741345; is that correct?

A. That is the Mays?

Q. Yes.

A. No. That contract was sold to Fred W. Gray.

Q. Do you have an address for Fred W. Gray?

A. Yes, 1955 South Figueroa. [24]

Q. Who sold it to Mr. Gray?

(Testimony of E. A. Redfern.)

A. BiRite. It was sold before the Receiver went in. That car was sold apparently—well, 6-19. Mr. Gray owns the contract.

Q. Has Mr. Gray paid for the contract, do you know?

A. No, there is \$1,500 due on it.

Q. So Mr. Gray hasn't paid BiRite; is that correct? A. No.

Q. And he hasn't paid you?

A. No. There is \$1,612 due the Bank of America.

The Referee: Let me ask you a question here, Mr. Redfern. You had Henry Zimmerman down for \$1,672.82.

The Witness: Oh, Zimmerman, pardon me, sir, you have the figures there.

Q. (By the Referee): Well, you give me what your figures are? A. \$1,672.82.

Q. What is the next one?

A. The next contract?

Q. Yes, of the three?

A. That is one; then there is Barbara Cohen.

Q. How much? A. \$934.16.

Mr. Fabian: No, that is the unpaid balance on the contract.

The Witness: That is the unpaid. [25]

Q. (By the Referee): But I mean the cash that came in? A. Oh, the cash we got?

Q. \$462.16; is that it?

Mr. Fabian: Yes, that was the amount of the check.

The Witness: \$407.16, was it not?

(Testimony of E. A. Redfern.)

The Referee: It shows here \$462.16. What are your figures?

The Witness: Yes, but this is the money the Sheriff got.

Q. (By the Referee): Oh, pardon me. \$407.16?

A. Yes.

Q. Now the Mays, the total amount was how much? A. \$541; \$100 and \$441.

Q. I wanted to be sure about it. Then this \$1,672.82 is what the Sheriff got on the Zimmerman?

A. Yes, that is what was in the \$4,000.

The Referee: All right. Go ahead.

The Witness: Oh, yes, in regard to the Gray deal——

Q. (By Mr. Fabian): Yes. Have you made demand on Mr. Gray for the \$1,500?

A. No, sir. Mr. Mays advised that in order to pay off that contract it would be necessary to collect either from Mr. Mays or Mr. Gray \$1,612, the total amount of the flooring.

Q. Mr. Mays advised that?

A. Yes, sir. [26]

Q. I take it you haven't collected the \$112 either then? A. No, sir.

Q. So to summarize the Mays transaction, you have a 1947 Mercury that was traded in and you also have a conditional sales contract covering the car on which there is \$1,500 due from Fred Gray, and you also have cash in the sum of \$541; is that correct?

(Testimony of E. A. Redfern.)

A. Well now, you will have to just stop a moment on that. Yes, that is right.

Mr. Fabian: All right. I have no more questions of Mr. Redfern.

The Referee: Any questions?

Mr. McDonnell: No more questions.

Mr. Utley: No questions.

The Referee: All right, you are excused, Mr. Redfern.

Well, it is 3 o'clock. We will recess for a few minutes.

(Recess.)

The Referee: All right, let's go ahead.

Mr. Fabian: Your Honor, I would like to call Mr. Beaver out of order. He is our appraiser and he can put in the valuations and then be excused.

R. S. BEAVER

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Fabian): What is your business or occupation, Mr. Beaver?

A. President Beaver Hudson Corporation.

Q. How long have you been engaged in that business? A. 12 years.

Q. How long have you been engaged in the automobile business? A. The same.

Q. And your business includes the purchase and sale of new and used automobiles, does it?

A. Correct.

(Testimony of R. S. Beaver.)

Q. And you have handled many thousands of sales in those 12 years; is that correct?

A. Yes, sir.

Q. Are you familiar with current market values of used cars, Mr. Beaver? A. Yes, sir.

Q. Did you make an appraisal of certain vehicles on the BiRite lot at the request of the Bank of America? A. Yes, I did.

Q. Do you have a report of that appraisal with you?

A. No, I think you have that. [28]

Mr. Utley: While counsel is looking for that, was your appraisal based on the reasonable saleable value of the cars, retail saleable value?

The Witness: I believe I gave a wholesale valuation and also a retail valuation.

The Referee: Both?

The Witness: Yes, sir.

The Referee: Show it to counsel, will you, please?

Mr. Fabian: Yes, sir.

Mr. McDonnell: Mr. Beaver, I forgot to catch it. Is the Mercury on there?

The Witness: No.

Mr. Fabian: The 1947 Mercury?

Mr. McDonnell: Yes.

Q. (By Mr. Fabian): As a matter of fact, you haven't seen the Mercury?

A. No, sir.

Q. Mr. Beaver, I show you two documents dated July 31, 1953, and August 11, 1953, directed to the

(Testimony of R. S. Beaver.)

Bank of America, and ask you whether that is your signature appearing on the two documents?

A. That is.

Q. That is a statement of your considered opinion of the fair market value of the vehicles that are described on those documents?

A. Yes, it is. [29]

Q. Did you examine the cars?

A. Yes, I did.

Q. Approximately how long a time did you spend in examining those vehicles?

A. I spent about a half a day.

Q. Did you also check recent sales of other vehicles? A. Yes.

Q. In making up your mind?

A. Yes, I did.

Mr. Fabian: If there is no objection I think we could just put in the appraisal report and excuse Mr. Beaver.

Mr. Utley: We have no objection.

Mr. McDonnell: No objection.

Mr. Utley: Because each vehicle is identified.

The Referee: You are excused. This will be Bank of America's Exhibit No. 2.

Next witness.

Mr. Fabian: I will call Mr. Fort.

The Referee: He has already been sworn, I think.

Mr. Fabian: Yes.

JOHN A. FORT

recalled, testified further as follows:

Mr. Fabian: Now, since the Trustee has—perhaps I had better put it in.

Direct Examination [30]

Q. (By Mr. Fabian): Mr. Fort, you are—what is your business or occupation?

A. Assistant Cashier of the Bank of America.

Q. At Wilshire and La Brea?

A. At the Wilshire and La Brea Branch.

Q. And your duties there are in connection with the making of—with automobile financing; is that correct?

A. Yes.

Q. And are you in charge of the department at that branch?

A. Yes.

Mr. Fabian: Since the Trustee has stipulated as to the validity of the trust receipts, your Honor, I don't see any reason for cluttering up the record with all of these documents other than those as to the cars in which Mr. Utley is interested. Do you agree that is all I need to put in?

Mr. McDonnell: I think that is all you need to put in.

The Referee: Do you have any question about the trust receipts?

Mr. Utley: Yes, I do, your Honor.

The Referee: That stipulation only applies to the Trustee then.

Mr. Utley: That is right. But we are only interested in five of the cars.

Mr. Fabian: Yes. [31]

(Testimony of John A. Fort.)

Q. Mr. Fort, did you handle the account—for convenience we will refer to it as the flooring account of BiRite Auto Sales, the bankrupt, for the flooring of automobiles at your branch?

A. Yes.

Mr. Fabian: Have you seen these, Mr. McDonnell?

Mr. McDonnell: Yes. That is all right.

Mr. Fabian: May it be stipulated, gentlemen, that a statement of trust receipt financing was filed with the Secretary of State on November 28, 1952?

Mr. Utley: If you say that is true, that is all right.

Mr. Fabian: This is the document. I can put it in evidence. I might as well put it in.

Q. (By Mr. Fabian): Mr. Fort, I will show you a document entitled Statement of Trust Receipt Financing, No. 110755, and ask you whether or not you have ever seen it before?

A. Yes, I have.

Q. Is that a statement removed from your files maintained at the La Brea-Wilshire Branch?

A. Yes.

Q. And did you cause that to be forwarded to the Secretary of State? A. Yes.

Q. In November, 1952?

A. November 21, 1952. [32]

Mr. Fabian: I offer that in evidence.

The Referee: All right, that will be Bank of America's Exhibit No. 3.

(Testimony of John A. Fort.)

Q. (By Mr. Fabian): Mr. Fort, I will show you a Trust Receipt No. 7483. Now, this pertains to Cars Nos. 3 and 4, which are paired, the third and fourth cars on the petition to reclaim.

Mr. McDonnell: You are referring to a 1952 Pontiac, Motor No. T8WH5586 and 1952, Lincoln Cosmopolitan, Motor No. 52LP5111H?

Mr. Fabian: That is correct.

Q. I will show you this trust receipt and ask you whether that was executed and turned over to the bank on or about the date it bears?

A. That is correct.

The Referee: By whom?

Q. (By Mr. Fabian): Executed by whom?

A. Erwin Resnick of BiRite, Erbel, Inc.

Mr. McDonnell: While I have no objection to your line of questioning, Mr. Fabian, I can't see that it is really material since we agree we are going to have to pay the bank \$3,357 to clear those two automobiles, or give the cars back.

The Referee: That may be, but Judge Utley—

Mr. McDonnell: It is not involved with Mr. Utley at all. [33]

Mr. Fabian: If I may have your stipulation that the balance due on the trust receipt is \$3,357.

Mr. McDonnell: Certainly.

Mr. Fabian: And if we have the cash or the cars by Wednesday, then there is no need to go into that.

Mr. McDonnell: That was my intent in the

(Testimony of John A. Fort.)

stipulation hitherto made, but I will restipulate on that basis, Mr. Fabian.

Q. (By Mr. Fabian): Mr. Fort, I show you Trust Receipt No. 7684, dated April 6, 1953, and ask you whether that document was executed and delivered to the bank on or about the date it bears?

A. Yes, it was.

Q. Executed by BiRite Auto Sales, by Erwin G. Resnick? A. That is right.

Q. Did you receive any other documents when you received that trust receipt, particularly pertaining to a Buick 1951, Buick 8, Engine No. 651-29114? A. Yes.

Q. What were those documents?

A. An ownership certificate.

Q. Is this the document? I show you the pink slip. A. Yes, it is.

The Referee: Is that the same as the pink certificate? [34]

The Witness: Yes, that is the California ownership certificate.

Q. (By Mr. Fabian): Now, what did you give in return for that trust receipt, Mr. Fort?

A. We gave them a credit of \$5,755.

Q. And that covered not only the vehicle as to which I have been asking you about but also other vehicles; is that correct?

A. Yes, that is true.

Mr. Fabian: You have seen these ledger sheets?

Mr. Utley: Yes.

Q. (By Mr. Fabian): Mr. Fort, I want to

(Testimony of John A. Fort.)

show you the ledger sheet of Erbel, Inc. and ask you whether you can find on that ledger sheet where a credit was given to the account of Erbel, Inc., doing business as BiRite Auto Sales?

The Referee: What bank now? Bank of America, what branch?

Mr. Fabian: Wilshire-La Brea.

The Witness: That is April——

Q. (By Mr. Fabian): April 6th?

A. Yes, we gave credit. Here is the entry right here, \$5,755 on April 6th—April 7th, rather.

Q. And that is a deposit entry shown in the ledger sheet; is that correct?

A. That is correct.

Q. Does that mean that funds were deposited in that [35] amount to the account of Erbel, Inc. on that day?

A. That is correct.

Mr. Fabian: Now, gentlemen, if there is no objection I would like to offer in evidence the trust receipt, and I will put the original trust receipt in and a photostat of the pink slip.

Mr. McDonnell: Mr. Fabian, I have no objection except I call your attention to this fact: Doesn't that trust receipt cover two automobiles?

Mr. Fabian: No, I'm on Item 10 now, which only covers one automobile.

Mr. McDonnell: It is a 1951 Buick? Just the 1951 Buick?

Mr. Fabian: That is the only one I think that is left on that.

Mr. McDonnell: I see. O.K.

(Testimony of John A. Fort.)

Mr. Utley: No objection on our part.

Mr. McDonnell: No objection.

Mr. Fabian: I offer these two instruments as a pair, your Honor.

The Referee: That is Bank of America's Exhibit 4.

Mr. Fabian: Is that No. 7684 in the corner?

The Referee: Yes.

Q. (By Mr. Fabian): The California Title Certificate, Exhibit 4, on that vehicle, when was that presented to you, Mr. Fort? [36]

A. The same date the trust receipt was presented.

Q. Was that your standard practice, to require —on this account, to require the presentation of the California Ownership Certificate before advancing any money on the basis of the car?

A. In all cases.

Q. I will show you Trust Receipt No. 7704, dated April 8, 1953, covering a 1950 Oldsmobile, Motor No. 8A357041H, and also an ownership certificate, and ask you to tell the Court when you received that and what you did when you received it?

A. That would have been on or about April 8th, which was the date of the trust receipt.

Q. And did you give a credit to the account of BiRite Motor Sales? A. We did.

Q. In return for that trust receipt?

A. That is correct.

Q. Do you find that on the ledger sheet?

(Testimony of John A. Fort.)

A. The amount of \$1,137 was credited on April 8th.

Mr. Fabian: All right. I offer that in evidence, the trust receipt original and the photostat of the pink.

The Referee: Bank of America's Exhibit No. 5.

Mr. Utley: That was the Oldsmobile, wasn't it?

Mr. Fabian: Yes.

Q. Mr. Fort, I show you Trust Receipt No. 7884, [37] dated May 19, 1953, and ask you when you first received that document?

A. That would have been on or about that date, May 19th.

Q. 1953? A. Yes.

Q. Did you give a credit when you took that trust receipt in?

A. We did, in the amount of \$4,925.

Q. Does that show on the ledger sheet that is in front of you?

A. \$4,925 was credited to the account on May 21, 1953.

Q. Did you receive any other document when you received that trust receipt?

A. Yes. We received four California Ownership Certificates.

Q. Are these documents two of the California Ownership Certificates that you received at that time? A. They are.

Q. And by "these documents," I refer to California Vehicle Certificates numbered T-1308392 and

(Testimony of John A. Fort.)

T-1308394. Those are the ones you received with this trust receipt? A. That is correct.

Mr. Fabian: I offer this——

Mr. Utley: Let me ask you, counsel, which of your [38] cars are covered in that one?

Mr. Fabian: Those are the two Chevrolets, Mr. Utley.

Mr. Utley: Those will be Exhibit 6?

The Referee: That is right, Bank of America's Exhibit 6.

Q. (By Mr. Fabian): Mr. Fort, I show you Trust Receipt No. 7845 covering two automobiles, executed the 9th of May, 1953, and ask you whether you received that on or about the date it bears, in the bank? A. We did.

Q. Did you make an advance on the basis of that trust receipt? A. We did.

Q. How much? A. \$2,410.

Q. And does that advance show on the ledger sheet as a deposit?

A. Yes. It was credited to the account on May 9, 1953.

Q. Did you receive any other documents with that trust receipt?

A. We received two California Ownership Certificates.

Q. Numbered—will you put the numbers in the record, please?

Mr. Utley: Counsel, are any of my cars in that one?

Mr. Fabian: Yes. One of them is the Mays auto-

(Testimony of John A. Fort.)

mobile [39] and the other one is the Cohen automobile. The Mays automobile is your Buick.

Mr. Utley: That is right.

Mr. Fabian: Or the Buick you claim. I will correct that.

The Referee: What do you mean by saying "your Buick"?

Mr. Fabian: I corrected that.

Mr. Utley: We will stipulate you were right the first time.

Q. (By Mr. Fabian): Those are California Ownership Certificates Nos. T-1294537 and T-129-4539; is that correct? A. That is correct.

Mr. Fabian: I offer them in evidence.

The Referee: That will be Bank of America Exhibit No. 7.

Q. (By Mr. Fabian): Now, Mr. Fort, at the time you made the advances of credit on those trust receipts, did you have any knowledge that those cars—that BiRite had not paid for those cars? A. I did not.

Q. Is it part of your duties to check with the Collection Department to see whether there were any unpaid drafts in on vehicles before you loaned money on them?

Mr. Utley: I object to that as——

Mr. Fabian: It is anticipatory and I will withdraw the question. [40]

The Referee: All right.

Q. (By Mr. Fabian): Now, Mr. Fort, with respect to those trust receipts that have just been

(Testimony of John A. Fort.)

placed in evidence—what are the numbers, 4 to——

Mr. McDonnell: To 7, inclusive.

The Referee: Seven different ones, I believe.

Mr. Fabian: The trust receipts, I think, are 4 to 7.

Mr. McDonnell: 4, 5, 6 and 7.

The Referee: That is right.

Mr. Fabian: Exhibits 4, 5, 6 and 7——

Mr. Utley: Counsel, can you tell me which exhibit that 1951 Buick is in?

Mr. McDonnell: That is Exhibit 4.

The Referee: Yes, that is right.

Q. (By Mr. Fabian): Can you tell me whether the bank has been paid for the—or repaid the amounts advanced on the basis of those trust receipts?

A. No, they have not been paid.

The Referee: You are referring now to Exhibits 4, 5, 6 and 7?

Mr. Fabian: Yes, your Honor.

Q. You have not been paid? A. No.

Q. Can you give the balances owing—can you give the balance owing on Exhibit No. 4? I think it would be a [41] good idea to put the balance in—plus interest, if you have calculated it.

The Referee: I see no harm, he can just write that down. It is his evidence.

Mr. Fabian: All right.

Mr. Utley: Let him write it for each car so I will know what the situation is on the cars I'm interested in.

(Testimony of John A. Fort.)

The Referee: That will be better still.

Mr. Fabian: Well, it can't be done for each car because each trust receipt stands on its own feet, you see.

The Referee: Well, if you cannot do it for each car then you can do it for each trust receipt. Give the number and sign your name and put the amount down.

Q. (By Mr. Fabian): Do you have that paper on which you calculated the interest, Mr. Fort, with you? Did you save a copy?

A. Yes, I have a copy of it in there——

Q. In my brief case?

A. Yes, in that miscellaneous folder.

Q. Mr. Fort, I am asking you to write the balance owing on each trust receipt, plus interest to date, August 13, 1953.

Now, the second one is on Exhibit——

The Referee: This is Exhibit 4. Now, you have got Exhibit 5?

Mr. Fabian: Yes. [42]

Mr. Utley: What did he say was the amount due on that 1951 Buick?

The Referee: \$4.20 interest.

Mr. McDonnell: That is all that is due on the Buick?

Mr. Fabian: That is the interest; \$1,204.20 altogether.

The Referee: \$1,204.20 including interest, yes.

Mr. Utley: Mr. Fabian, if you will tell me the

(Testimony of John A. Fort.)

amount on the Olds when you get it, I would appreciate it.

Mr. Fabian: \$1,140.98.

Now, the next one is Exhibit 6.

The Referee: Did you get the figures on 5?

Mr. McDonnell: Yes.

The Referee: \$1,140.98 including interest.

Mr. Fabian: The balance on that is \$2,136, interest \$7.48.

And the last one——

Mr. McDonnell: What was the total on that one, No. 6?

The Referee: \$2,143.48.

Mr. Fabian: The balance on the next one is \$2,410, interest \$8.44.

The Referee: And this No. 7, on that it is \$2,418.44.

All right, go ahead.

Mr. Fabian: I think that is all.

The Referee: All right, cross examination? [43]

Cross Examination

Q. (By Mr. Utley): Mr. Fort, you testified a moment ago of your own personal knowledge that you didn't know there were any unpaid drafts, I believe you said, didn't you? A. Yes.

Q. You knew, did you not, that the bankrupt or BiRite Auto Sales had been purchasing cars from Motores de Mexicali in Mexico?

A. As of what date or what time?

Q. Well, first, you knew of that, didn't you?

(Testimony of John A. Fort.)

The Referee: You ought to give him a date.

The Witness: I did sometime in May. I don't recall the exact date.

Q. (By Mr. Utley): Well, while the drafts were still in the bank?

A. The day that the last drafts to my knowledge were returned. That is the first knowledge I had.

Q. That appears to have been on May 19, 1953, that the last drafts were returned. Then you knew of that transaction at that time? A. Yes.

Q. And you knew that there were a number of drafts then in the bank that had not been paid?

A. I did on that date, yes.

Q. Now, isn't it a fact that subsequent to that [44] date you extended a credit to BiRite on your ledger sheet here of—a credit on some of the cars purchased from Motores de Mexicali?

A. On what date?

Q. You gave a date a while ago, I think it was the 21st.

The Referee: Wasn't it the 19th?

Mr. Utley: I think the date of the trust receipt shows on the Chevrolets the 19th. That was the date the drafts were returned, and the credit I think shows on the 21st of May.

The Witness: Well, of course, that day, on the 19th, if we took them in on the 19th it is very possible that they would not have been credited until the 21st. However, I don't recall that 21st date.

(Testimony of John A. Fort.)

Mr. Utley: Now, at this time, may it please the Court, I have the automobile purchase draft which involves a 1951 Buick Two-Door Sedan, Motor No. 65129114 for \$1,300. I would like to have that marked as Creditor's Exhibit 1.

The Referee: We had better call it "A", hadn't we?

Mr. Utley: Creditor's Exhibit A.

Mr. Fabian: For identification?

Mr. Utley: Yes, for identification.

The Referee: I'm just wondering where to mark it.

Mr. Utley: Maybe you can get it on the bottom of that little piece of paper attached there. [45]

The Referee: I guess I can do it here.

Mr. Fabian: What is the number of that one, Mr. Utley, the first one?

Mr. Utley: You mean the motor number?

Mr. Fabian: Well, the motor number or some way to identify it.

Mr. Utley: Well, it is the 1951 Buick and there is only one 1951 Buick involved in the ones I'm interested in.

The Referee: All right, go ahead.

Mr. Utley: I have now an automobile purchase draft dated March 6, 1953, involving a 1950 Oldsmobile Four-Door Sedan, that we have heretofore mentioned, and I would like to have that marked as Creditor's Exhibit B for identification.

The Referee: That will be Exhibit B. Go ahead.

Mr. Utley: I now have an automobile purchase

(Testimony of John A. Fort.)

draft dated April 2, 1953, for \$1,350, covering a 1952 Chevrolet automobile, Four-Door Sedan—I had better identify them by Motor Number because there are two Chevrolets. KAA14323. I would like to have that marked as Creditor's Exhibit C.

The Referee: For identification?

Mr. Utley: Yes, for identification.

The Referee: All right.

Mr. Utley: The next one is another 1952 Chevrolet Four-Door Sedan, Motor No. KAA49792, for \$1,350, dated April 2, 1953, and I would like to have that marked as Creditor's [46] Exhibit D for identification.

And then another automobile purchase draft dated April 2, 1953, for \$2,000, covering a 1952 Buick Riviera; and without giving the motor number, this is the Buick that was sold to Mr. Mays. I would like to have it marked for identification. That would be Exhibit E, I believe.

The Referee: That is right.

Q. (By Mr. Utley): Now, Mr. Fort, I am going to call your attention to the Bank of America's Exhibit No. 6, which covers the same Chevrolets that are shown in the automobile purchase drafts of the debtor, Exhibits C and D for identification, and what day now did you—what date was this money advanced on those two Chevrolets, by the bank on the trust receipt?

Mr. Fabian: That is objected to as asked and answered.

Mr. Utley: This is cross examination.

(Testimony of John A. Fort.)

The Referee: Well, what is wrong with asking him what date the money was advanced?

Mr. Fabian: Well, he has already testified to it.

Mr. Utley: Well, the date of the trust receipt is May 19th.

The Witness: It would be on or about that date.

Q. (By Mr. Utley): Now, calling your attention to the back of these two drafts, which are Exhibits D and E for identification, those drafts were returned by your bank on [47] the same date, weren't they, unpaid?

Mr. Fabian: I object to the question as improper cross examination. The documents speak for themselves and there were no questions asked——

The Referee: Well, it helps clear up the record. This man knows what he is talking about. Let him tell us. I don't see any harm in that.

The Witness: The stamp here says it was returned on May 19, 1953.

Q. (By Mr. Utley): Is that your stamp?

Mr. Fabian: I object to the form of the question.

The Witness: Personally I can't tell.

The Referee: Well, I have no doubt you mean by "your stamp" the stamp of the bank?

Mr. Utley: That is right.

The Witness: Well, I mean all I can go on is what I can read, and I can't read it.

Q. (By the Referee): Well, does that look like the bank's stamp?

(Testimony of John A. Fort.)

A. I would say that it is a bank stamp, yes, but I have no way of knowing.

Q. (By Mr. Utley): Well, you said you had knowledge of these drafts on or about the date they were returned?

A. I didn't say these drafts. I don't know these drafts from any other drafts. I was told there were some drafts being returned. [48]

Q. Now, will you check your ledger sheet which is in evidence here——

Mr. Fabian: That is not in evidence, Mr. Utley. I have no objection to it going in if you want it in.

The Referee: That is right.

Q. (By Mr. Utley): Will you examine your ledger sheet and find where the bankrupt was given credit for these two Chevrolets, or the moneys advanced on them, what date they were given credit?

The Referee: The bankrupt given credit?

Mr. Utley: Well, the money loaned to the bankrupt, yes.

The Referee: Debited against the bankrupt, wasn't it?

Q. (By Mr. Utley): No, they loaned the money on the strength of the trust receipt. That is right, isn't it?

A. Yes, on the trust receipts and the title.

Q. Yes. What day does that statement show——

A. The credit was actually posted on the ledger on May 21, 1953. However, I have no way of knowing—I suppose it was entered in the dealer's book on May 19th.

(Testimony of John A. Fort.)

Q. But you don't know?

A. No, I don't.

Mr. Utley: I believe that is all at this time.

The Referee: Anything further from this witness? I guess you are excused.

Mr. Fabian: Just one more question. [49]

Redirect Examination

Q. (By Mr. Fabian): You stated that you knew of the presence of Motores de Mexicali drafts in the bank on May 19th; is that correct, Mr. Fort, or thereabouts?

A. Well, I actually didn't know the name. I was told that a bunch of drafts had been called back by the Calxico Branch for some Mexicali dealer. I didn't examine the drafts and didn't know the name.

Q. You didn't know anything about it before that time; is that right?

A. Any drafts being in the bank?

Q. Yes. A. No, I did not.

Mr. Fabian: That is all.

Mr. Utley: There is one question on cross examination I overlooked, your Honor.

Recross Examination

Q. (By Mr. Utley): Mr. Fort, when the bankrupt came in—he came in and asked you for this money on these trust receipts that have been offered in evidence? A. Who asked us for it?

Q. The bankrupt, BiRite Auto Sales. They

(Testimony of John A. Fort.)

asked you to advance them the money on the strength of these trust receipts? [50]

A. Well, it is customarily understood. We have an agreement with them to do that when they bring them in, just like you do a check; we wouldn't ask any questions.

Q. Did they say what they wanted the money for?

A. No, except in the natural conduct of their business, as far as I know.

Q. And did you know the nature of their business called for them to purchase secondhand automobiles from various dealers on the strength of automobile purchase drafts?

Mr. Fabian: When?

The Witness: I couldn't answer that particularly because the only thing that I was dealing with this particular dealer on was California titles. So I knew nothing about where they were purchasing their cars. I have heard in conversation that they were purchasing part of their cars from out of State.

Mr. Utley: That is all.

The Referee: Any further questions?

Mr. Fabian: No further questions.

The Referee: You are excused.

How much time will this take, gentlemen? I will give you all the time you need but I have to plan ahead.

Mr. Fabian: I am through.

Mr. Utley: It won't take me very long.

The Referee: Can we get through today? [51]

Mr. Utley: Yes.

The Referee: All right. We will recess then.

(Recess.)

The Referee: Go ahead, gentlemen.

Mr. Utley: Are you through, Mr. Fabian?

Mr. Fabian: I have rested.

Mr. Utley: I would like to call Mr. Resnick under 21-J.

ERWIN G. RESNICK

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Resnick, you were the manager of the bankrupt here? A. Yes, sir.

Q. Now, you know Mr. Luken sitting back here? A. Yes.

Q. You also know Mr. Rodriguez?

A. Yes, sir.

Q. Was Mr. Rodriguez working for you in March and April of this year?

A. He represented us as a buyer, yes, sir.

Q. As a buyer where? A. In Mexicali.

Q. And did you authorize him to purchase automobiles [52] from Motores de Mexicali in Mexicali for you?

A. He was authorized to buy automobiles from anyone in Mexicali.

Q. Including Motores de Mexicali?

A. Including Motores de Mexicali.

Mr. Utley: May I have those exhibits, your Honor, those drafts?

(Testimony of Erwin G. Resnick.)

Q. (By Mr. Utley): Now, you bought a good many automobiles from Mr. Luken of the Mexicali Motors prior to March and April of 1953, did you not? A. Oh, yes, sir.

Q. And I will show you Creditor's Exhibit C for identification, and in the purchase of those automobiles did you always give a purchase draft similar to that? A. Yes, sir.

Q. And do you recognize the signature on that draft? A. Yes, sir.

Q. Who is that?

A. Mr. Mario Rodriguez, and this is also one of our own drafts.

Q. It is one of your own printed drafts signed by Mr. Rodriguez? A. Yes.

Q. And he was authorized to sign those drafts?

A. Yes, sir.

Q. Now, were all the automobiles purchased from [53] Motores de Mexicali purchased on drafts of that type? A. Yes, sir.

Q. And up until then—up until certain drafts that came in in March and April of 1953, were your drafts always paid promptly? A. Yes, sir.

Q. Now, when you first talked to Mr. Luken of Motores de Mexicali, did you ask to have the possession of the cars and the titles to the cars before the drafts went through and were paid?

Mr. Fabian: I object to this as not binding on the bank, this conversation, if he had any, and being hearsay as to us.

Mr. Utley: Well, it certainly goes to tie the

(Testimony of Erwin G. Resnick.)

transaction to the question of whether or not the cars were obtained on the promise that the drafts would be paid promptly.

The Referee: Oh, I don't see any harm in the question. Objection overruled.

The Witness: This goes back to the—this conversation we had as far as getting title to the cars goes back before there was even ever an Erbel, Inc. I used to do business with them some time ago.

Q. (By Mr. Utley): You also had a conference even before Erbel was incorporated?

A. Yes, sir.

Q. With reference to purchasing automobiles from [54] them? A. Yes, sir.

Q. And with reference to acquiring the cars and titles immediately upon the issuance of the drafts?

A. Yes, sir.

Q. And what did you say to them at that time with reference to your financial ability to pay?

A. Well, I told them we formed this Erbel, Inc., Mr. Cowan was with me, that is Mr. Ray Cowan, he was with me at the time, and we told them we have Bank of America flooring plus the fact we had a guarantee of a substantial amount of money at the bank.

Q. Did you tell them at that time that Mr. William D. Cowan had a continuing guarantee at the bank of a hundred thousand dollars?

A. Yes, sir.

Q. And did you tell them that the drafts would be paid promptly upon presentation?

(Testimony of Erwin G. Resnick.)

A. Yes, sir. They always have been.

Q. And they always were up until this bunch of drafts? A. Yes.

Q. Now, showing you Creditor's Exhibits A, B, C, D and E, have any of those drafts ever been paid?

A. If they would have been we would be in possession of these envelopes. [55]

Q. Well, you would say then that they haven't been? A. No, sir.

Q. The papers there in front of you, Mr. Resnick, indicate that you floored these cars through the Bank of America and obtained money. For what purpose were those cars floored?

A. We used to floor them—we used to floor a majority of our cars for the purpose of carrying on our business and also paying the drafts.

Q. Were those cars floored for that purpose?

A. They were floored for carrying on our business.

Q. Well, any of the money that you got from the flooring of those cars didn't go to pay the drafts, did it? A. No.

Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors?

A. Well, I don't recall the exact date. I know I went down to Mexicali.

Q. At the time you were there do you recall his having asked you if all the drafts for the month of

(Testimony of Erwin G. Resnick.)

March had been taken care of? A. Yes.

Q. And you recall telling him that they had been?

Mr. Fabian: I object to that on the ground it is immaterial to any of the issues before this Court as to the [56] title to the vehicles.

The Referee: What is the purpose of it?

Mr. Utley: It shows the representations that were made at the time of obtaining possession of the cars and title to them.

The Referee: You mean representations made to your client?

Mr. Utley: Yes.

The Referee: By the bankrupt?

Mr. Utley: Yes.

Mr. Fabian: But they are not binding on the bank. They are immaterial as far as the bank is concerned.

The Referee: Wouldn't that be so unless the bank knew about it?

Mr. Utley: May it please the Court, I will cover that point later on about the bank.

Mr. McDonnell: I think the Court should also bear in mind this is a three-cornered lawsuit between the Trustee and the bank and Mr. Utley's client.

Mr. Utley: Of course, the bank doesn't stand in the position of an innocent purchaser.

The Referee: That is questionable in California. Go ahead. I think the objection is good unless you

(Testimony of Erwin G. Resnick.)

can show—unless you can tie it up with the bank some way.

Mr. Utley: May it please the Court, I will call your attention in a few minutes as to how and in what manner *the* [57] *is* not in the position of an innocent purchaser.

The Referee: I know, but I mean any conversations like that unless the bank was connected with it wouldn't bind the bank, would it?

Mr. Fabian: That is my point.

Mr. Utley: This particular conversation won't bind the bank. In other words, we don't contend that the bank was a party to the transaction in question, to the transaction of getting the cars away from my client without paying for them—at that particular moment, anyway.

The Referee: I think you had better drop that line unless you can connect it with the bank in some way.

Mr. Utley: Well, I believe that is all then with this witness.

The Referee: Any other questions of this witness?

Mr. Fabian: Yes, your Honor.

Cross Examination

Q. (By Mr. Fabian): Mr. Resnick, when you obtained these vehicles from Motores de Mexicali, obtained possession of them, physical possession of them, did you receive any documents from Motores de Mexicali? A. Yes, I did.

(Testimony of Erwin G. Resnick.)

Q. What documents did you receive?

A. The title of the car.

Q. A bill of sale. [58]

A. A registration and a bill of sale.

Q. What registration is that?

A. Well, Mexico is a non-title State. That is the Mexican registration.

Q. You received a Mexican registration certificate; is that right? A. Yes.

Q. And a bill of sale; is that right?

A. That is right.

Q. And you received those when you took possession of the car; is that correct?

A. As a rule when we took possession of the car or else Mr. Rodriguez would pick them up the next day for us and air mail them up here.

Q. But they were not transmitted through the bank? A. That is right.

Q. Now, what did you do with those documents, Mr. Resnick?

A. We would plate the cars in the State of California.

Q. You would turn those documents in to the Department of Motor Vehicles?

A. And get title and registration, yes, sir.

Q. What was in these envelopes that are in front of you there? A. Nothing. [59]

Q. As the Creditor's exhibits?

A. Nothing, sir.

Q. Well, one of them has some papers in it. Do you want to open it up and see what that paper is?

(Testimony of Erwin G. Resnick.)

A. It is just blank paper.

Q. A blank piece of paper? A. Yes, sir.

Q. Did all of the drafts in front of you contain blank pieces of paper? A. No, sir.

Q. Some of them were empty?

A. Yes, sir.

Q. Did any of them contain the title documents to these vehicles? A. No, sir.

Mr. Utley: No more questions of Mr. Resnick.

The Referee: Any other questions?

Mr. McDonnell: Yes, I have some questions of Mr. Resnick.

Cross Examination

Q. (By Mr. McDonnell): Mr. Resnick, in response to Mr. Utley's direct examination you told us that you had agreed with Mr. Luken that you would get title to these automobiles at or about the time that physical possession was delivered. Isn't that correct? [60] A. Yes, sir.

Q. Wasn't that what I understand your testimony to be? A. Yes, sir.

Q. When did that agreement take place with Mr. Luken where you agreed to get the title at the time you got possession?

A. Like I explained before, I did business with Mr. Luken quite some time ago before there was ever a Bi Rite Auto Sales.

Q. And had you always done business with Mr. Luken on this basis? A. Yes.

Q. And did you ever give Mr. Luken to under-

(Testimony of Erwin G. Resnick.)

stand why you wanted title to these cars when you got possession?

A. So I could turn them into California title and floor them so I could pay them.

Q. Did you tell him you intended to take the cars and floor the cars with some lending institution in the State of California?

A. Well, that was the original basis of it, yes.

Q. Now, you have got a number of drafts there before you? A. Yes, sir.

Q. I want you to look through them and tell me whether you can recall when those drafts were given and the [61] cars they were given for. Can you recall that occasion? Those are the unpaid drafts.

A. This is only four. We used to buy, I imagine, around 40 or 50 a month, some months maybe more.

Q. With reference to those particular drafts, did you intend or was it your intent not to pay Mr. Luken on those drafts when they were issued?

A. I certainly didn't.

Q. In other words, you didn't issue those drafts and intend not to pay them? A. No.

Mr. McDonnell: I have no further questions.

Redirect Examination

Q. (By Mr. Utley): Mr. Resnick, if you intended to pay those drafts when they were issued, why did you floor the cars and obtain money on the cars and not use that money for the payment of

(Testimony of Erwin G. Resnick.)

the drafts at the time they were in the Bank of America here in Los Angeles?

A. We used to do that quite often. We put money in the bank and paid some of the drafts and used some of the money. We did that all the time. It was just a common practice for us to do it that way. We did that for some time.

Mr. Utley: That is all. [62]

Recross Examination

Q. (By Mr. Fabian): In other words, there was an extension of credit by Motores de Mexicali to you; is that correct?

A. Well, the credit based on the drafts.

Mr. Fabian: That is all.

Redirect Examination

Q. (By Mr. Utley): But you told Mr. Luken that the drafts would be paid promptly upon presentation to the bank?

A. As a rule we always paid them, yes, sir.

Mr. Utley: That is all.

Recross Examination

Q. (By Mr. McDonnell): But you had drafts lay in the bank before, that is before these four, that you paid?

A. Many times we have had to get extensions because we couldn't pay drafts,—not just these but other drafts.

Q. You got extensions from Mr. Luken; is that right? A. Either Mr. Luken or the bank.

Mr. McDonnell: That is all.

Mr. Utley: That is all, Mr. Resnick. Mr. Luken.

MARIO LUKEN

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Luken, where do you reside? A. In Mexicali.

Q. And what is the nature of your business or occupation?

A. I am general manager of Motores de Mexicali.

Q. And how long have you been so engaged?

A. Two years.

Q. During the latter part of last year and the first part of this year did you have some business transactions with Mr. Resnick who just left the witness stand? A. Yes, sir.

Q. What was the general nature of those transactions? A. We sold him automobiles.

Q. Now, when you first began to deal with him did you sell wholesale to him? A. Yes, sir.

Q. Automobiles? A. Yes, sir.

Q. When you first began to deal with him, under what name was he operating at that time? I am speaking now [64] of the fall of last year.

A. Before they operated under Bi Rite we used to sell him cars and they were paid with checks on the Mexicali Bank.

Q. That was before they started with Bi Rite?

A. Yes, sir.

Q. Now, after they started with Bi Rite did you

(Testimony of Mario Luken.)

have a conversation with Mr. Resnick with respect to selling him cars? A. Yes, sir.

Mr. Fabian: I object to the conversation as not binding on the bank and hearsay.

The Referee: Wouldn't that be true?

Mr. Utley: May it please the Court, here is the situation. We have a right to show fraud here because otherwise if we sell automobiles under false representations we don't part with them voluntarily, and if the bank has knowledge of some situation that would estop them, that is a question as far as the bank is concerned.

Now, furthermore, there is another question here. If there is any equity in these cars over and above the amount of the bank's interest in them, and these titles to these cars were obtained from Mr. Luken under false pretenses, he would be entitled to that equity without regard to the bank's position.

The Referee: I know, but wouldn't the bank have to [65] be involved some way?

Mr. Fabian: Yes.

Mr. Utley: It is our contention, please the Court, that these drafts—if you will examine them, those drafts are all automobile purchase drafts, and they show on their face that they were for the purchase of a certain automobile, and they show on their face they were to be paid on presentation to the bank. Now, it is our contention that those drafts **laying there in the bank unpaid**, whether Mr. Fort himself knew about it or not, the bank was charged with knowledge that those drafts on those particu-

(Testimony of Mario Luken.)

lar cars described in the drafts had not been paid and they were advancing money on cars that they knew had not been paid for.

The Referee: Assuming all that to be true, how would any conversation of this witness with someone else with which the bank was not concerned bind the bank?

Mr. Utley: Well, in the first place we must show that there was a fraudulent representation made to Mr. Luken in order to——

The Referee: Well, this is the way we will handle it. I will permit the question to be answered but you may move to strike it unless they connect it up with the bank.

Mr. Fabian: All right.

Mr. McDonnell: I think that as to the Trustee's interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven't objected.

The Referee: That is right.

Mr. Utley: Mr. Reporter, will you read the last question?

(Record read as follows:

"Q. Now, after they started with Bi Rite did you have a conversation with Mr. Resnick with respect to selling him cars?")

The Witness: Yes, sir, I did.

Q. (By Mr. Utley): And who was present other than Mr. Resnick?

A. Mr. Cowan's son and Mr. Rodriguez.

Q. And where did this conversation take place?

(Testimony of Mario Luken.)

A. In my office in Mexicali.

Q. And do you recall about when?

A. I can't recall.

Q. Was it late last year or early this year?

A. Well, it was more late last year.

Q. And what was said—what did Mr. Resnick tell you?

A. He told me that he wasn't in business any more with Mr. Abel Melendez, who was the man that was paying for the cars with checks in Mexicali, but now he was in a partnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the [67] drafts would be paid immediately on getting to the bank.

Q. What if anything did he say to you with respect to your delivering him immediate title to the cars?

A. He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.

Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation?

A. Well, I believed him. We had done business with him before.

(Testimony of Mario Luken.)

Q. And did you—after his telling you that, did you give him the title to the cars as well as—

A. Yes, sir.

Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars?

A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money.

Mr. McDonnell: I didn't get that last.

(Record read as follows:

“We wouldn't give the titles unless we get the money.”) [68]

Mr. Fabian: I move to strike it as not responsive to any question.

Q. (By Mr. Utley): Well, what if anything did you say to him—

The Referee: I suppose that motion is good. Reframe the question.

Q. (By Mr. Utley): What if anything did you say to him, Mr. Luken, when you were talking to him at the time about this being a cash transaction?

A. Well, he told me that those drafts, we can consider that as a check, and they would be paid immediately upon presentation to the bank.

Q. (By the Referee): He said the checks that he gave to you would be paid immediately upon presentation to the bank?

A. They were the same as a check.

Q. He said that would be paid immediately by the bank?

(Testimony of Mario Luken.)

A. They would be paid as soon as they were presented to the bank.

Mr. Utle: May I have those drafts, your Honor?

Q. I am going to show you Creditor's Exhibits A, B, C, D and E and ask you to examine those, Mr. Luken, and are these five drafts five of the automobile purchase drafts that were given to you by Bi Rite Sales?

A. Yes, sir.

Q. And who personally handed those to you?

A. These were handed to me by Mr. Rodriguez.

Q. The gentleman sitting there (indicating)?

A. Yes, sir.

Q. Now, I am going to call your attention to the fact that Exhibits A and B were dated March 6, 1953, and call your attention to the fact that Exhibits C, D and E were dated April 2, 1953. At the time you received the April drafts, did you know that the other two drafts, Exhibits A and B, had not been paid?

A. No, sir. I didn't know that they were unpaid.

Q. You didn't know that they were unpaid?

A. No.

Q. Had your dealings prior to this time in connection with the cashing of drafts been handled by Bi Rite Auto Sales in a prompt manner? That is, had they paid promptly before that?

A. Yes, sir, they had been paying.

Q. Would you have parted with the title to the automobiles upon any other condition other than

(Testimony of Mario Luken.)

that they would be paid promptly upon presentation? A. No, sir.

Mr. Utley: You may examine.

Cross Examination

Q. (By Mr. Fabian): Well, as a matter of fact, Mr. Luken, there had been substantial delays in payments of some of these drafts [70] prior to March 6th, had there not? Didn't you have drafts outstanding before that time for say periods of weeks?

A. Well, we never knew. We were credited by our bank immediately.

Q. Oh, your bank gave you credit on them immediately? A. Yes, sir.

Q. On the basis of your endorsement; is that right? A. That is right.

Q. Once in a while some were returned, though, isn't that true, unpaid?

A. Until we get this, that was the only time I knew that they were unpaid.

Q. Your bank may have known it and you didn't; is that correct? A. They might.

Q. You carry a sizeable bank balance, I take it, with the Banco Mercantil, so that you didn't know specifically what the condition of this account was?

A. No, every time they make a charge to our account they let us know first.

Q. They let you know? A. Yes.

Q. And you didn't check with them to find out

(Testimony of Mario Luken.)

whether these drafts had been paid or not; is that right? A. No, sir.

Q. Now, in this discussion you testified about, [71] Mr. Luken, you testified that Mr. Resnick advised you that—and you understood that the purpose of delivering the title documents in Mexico was that the cars would be floored; isn't that correct?

A. Yes.

Q. And you understand what flooring means and understood at that time what flooring means; is that correct? A. Yes, sir.

Q. And that was contemplated at the time you delivered him the documents? A. Correct.

Q. Now, did you put the blank pieces of paper in those envelopes, Mr. Luken?

A. No, sir, that is the way I was getting all the drafts (indicating). I didn't know there was a piece of white paper inside, or whatever there was inside.

Q. In other words, that is just the way they came to you? A. Yes, sir.

Q. Did you know there was blank pieces of paper inside of some of them?

A. I knew after I opened one when I got this back. I thought maybe it was a list of the cars that Mr. Rodriguez had specifying title or something that Mr. Resnick had, but I didn't know it was a white paper.

Q. Did you put these X's on the reverse of the drafts? [72] A. No, sir.

Q. At the place where it says "Documents Enclosed"? A. No.

(Testimony of Mario Luken.)

Q. Do you know who did?

A. Well, I think Mr. Rodriguez.

Q. You don't know for sure?

A. I don't know for sure.

Q. You didn't see him do it?

A. No, I haven't seen him.

Q. Now, the representation as I understand it that Mr. Rodriguez made to you was that the drafts would be paid?

A. Not Mr. Rodriguez, Mr. Resnick.

Q. Mr. Resnick, that the drafts would be paid?

A. Yes.

Q. And he fell down on that promise; is that right? A. That is correct.

Q. And you placed confidence in that representation, did you not? A. Well,—

Q. You must have.

A. Well, I believed that the draft was going to be paid as he said.

Q. And that is why you gave him the cars and the title; is that right? A. That is right.

Q. Do you feel now that that confidence was [73] misplaced, Mr. Luken?

A. Well, the only way I feel is that we should get our money back.

Mr. Fabian: No more questions.

Cross Examination

Q. (By Mr. McDonnell): Mr. Luken, you have testified concerning this conversation that you had with Mr. Resnick and Mr. Cowan's son was present

(Testimony of Mario Luken.)

and I think Mr. Rodriguez? A. Yes.

Q. Did you have any other conversations with Mr. Resnick or with anyone else from the bankrupt concerning the payment of these drafts, after that time?

A. Any conversation regarding the drafts?

Q. That is right, regarding the purchase of cars by draft? A. No, sir.

Q. That was the one and only conversation you had? A. Yes, sir.

Q. By the way, do you do business with drafts with other American automobile concerns other than this one?

A. Yes, we did it once but that is all.

Mr. McDonnell: That is all the questions I have.

Redirect Examination

Q. (By Mr. Utley): You were asked if you had any other conversations. [74] Did you see Mr. Resnick on April 2nd at the time this last bunch of drafts were issued?

A. Yes, he was in my office in Mexicali.

Q. Did you have any conversation with him at that time as to whether or not all the March drafts had been paid?

A. He went in to buy more cars——

Mr. McDonnell: May we have the foundation?

Mr. Utley: Just say yes or no.

The Referee: Everybody stop. Talk one at a time. Put your question now.

Q. (By Mr. Utley): Just state whether or not

(Testimony of Mario Luken.)

you had a conversation with Mr. Resnick at the time the drafts on April 2nd were issued?

A. Yes, we had a conversation.

Q. And where did that conversation take place?

A. In my office in Mexicali.

A. Who was present?

A. Mr. Cowan's son and Mr. Rodriguez.

Q. And Mr. Resnick?

A. And Mr. Resnick, yes.

Q. And what was said at that time between you and Mr. Resnick.

A. Mr. Resnick said that he wanted to buy more cars, and I asked him how he was with the drafts. He said that everything has been taken care of. So that is why I didn't mind selling him more cars.

Q. Now, Mr. Fabian asked you if Mr. Resnick told you that the drafts would be paid. Did he also tell you that the drafts would be paid immediately upon presentation to the bank?

A. Yes, sir.

Q. The same as a check?

A. Yes, sir.

Mr. Utley: I believe that is all.

The Referee: All right. Next witness. You are excused.

Mr. Utley: Mr. Rodriguez.

M. R. RODRIGUEZ

called as a witness, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Utley): Mr. Rodriguez, I'm going to show you Creditor's Exhibits A, B, C, D and E,

(Testimony of M. R. Rodriguez.)

which are five drafts which purportedly are signed by you. Did you sign those drafts?

A. Yes, sir.

Q. Did you also fill them out?

A. Yes, sir.

Q. And did Mr. Resnick request you to do so?

A. Yes, sir.

Q. And did he request you to purchase the automobiles described in those drafts? [76]

A. Yes, sir.

Q. And was each of the automobiles delivered to you by Mr. Luken? A. Yes, sir.

Q. Now, were you present sometime late last year in a conversation between Mr. Resnick and Mr. Luken with respect to giving drafts of this kind for automobiles? A. Yes, I was there.

Q. I beg your pardon? A. I was there.

Q. And what was said, particularly with reference to the financial ability of Bi Rite to pay for automobiles?

Mr. Fabian: May I have the same objection and same ruling as to this line of questioning?

The Referee: You can move to strike it all out unless it is connected up with the bank.

Mr. Fabian: Thank you.

The Witness: Well, when he got there, he had gotten this new deal and it looked like they had gotten a hundred thousand dollars to guarantee the cars, and that he could pay for them as soon as the cars got there. In other words, as soon as the drafts

(Testimony of M. R. Rodriguez.)

would get there they would be paid for because he had gotten more money to buy them.

Q. (By Mr. Utley): Did he at that time ask to have the title to the cars delivered directly to him upon making out a draft? [77]

A. Oh, I don't remember—I was supposed to keep on doing business the way we were, and as long as he had that guarantee, well, I was just going to keep doing it the way I had been doing it always.

Q. Did you know of any of his drafts being returned until this bunch in March and April?

A. No, sir.

Q. And you signed them all, didn't you?

A. Yes, sir.

Mr. Utley: You may examine.

Mr. Fabian: I don't believe I have any questions of this gentleman.

The Referee: Have you any questions, Mr. McDonnell?

Mr. McDonnell: I don't think so, no, your Honor.

The Referee: Then I guess that is all with this witness then.

Mr. Utley: That is all, your Honor. At this time I would like to offer in evidence Creditor's Exhibits A, B, C, D and E as exhibits.

The Referee: Oh, yes, those that were received for identification will now be received in evidence.

Mr. McDonnell: No objection.

Mr. Fabian: No objection.

The Referee: Now, anything further in this case?

Mr. Utley: That is all the evidence on our behalf.

The Referee: How would it be to have this written up, [78] gentlemen, and then submit it on briefs?

Mr. Utley: Satisfactory to me.

Mr. McDonnell: That is O.K.

Mr. Fabian: The only thing is what happens to the vehicles in the meantime. The market is going down.

Mr. McDonnell: Mr. Utley has stipulated as far as the four in which he is interested that we may sell—that is, to sell and impound, not to disburse the money. We are going to have the sale tomorrow and if we can sell and impound that will prevent the further depreciation of the vehicles.

The Referee: You three can cooperate on that.

Mr. Utley: I have already stipulated.

Mr. McDonnell: We have already stipulated.

Mr. Fabian: What happens if he don't sell them by Wednesday? He is going to sell them tomorrow, but what if we don't get a sale for them tomorrow? Will they turn them over to the bank then?

Mr. Utley: Are you demanding to get your money out of them in each and every case?

Mr. Fabian: Or give us the vehicles.

Mr. McDonnell: Why don't we do this, Judge, put this over tentatively until next Wednesday. In the meantime we will have the sale. If we get enough on the vehicles—do I understand if we get sufficient, Mr. Fabian, we may simply sell and im-

pound, if we get more than you have against [79] them?

Mr. Fabian: Yes.

Mr. McDonnell: If we get less we will then consult as to what to do and then make a decision by next Wednesday.

Mr. Fabian: I guess so, because then the Judge will just be deciding as to the impounded funds rather than the vehicles.

The Referee: How is 11 a.m. next Wednesday?

Mr. McDonnell: That is fine as far as the Trustee is concerned.

Mr. Utley: August 19th I'm not too sure of my calendar.

The Referee: Do you want to make it the 20th?

Mr. Utley: Let's make it the 19th at 11 o'clock and I will be here if I can; and our position, please the Court, is quite simple. We contend that we parted with this title under a false representation. It is a good deal like giving a bum check, and we also concede that had that property reached the hands of an innocent purchaser we couldn't have done anything about it, but the Trustee as to any equity certainly doesn't stand in the position of an innocent purchaser. We contend that the bank isn't an innocent purchaser because of the fact at the time they loaned the money on the cars these unpaid drafts describing those particular cars were lying in the bank that advanced this money.

The Referee: Well, this is complicated and I want to [80] study the law through briefs, if you don't mind.

Mr. Fabian: What about the filing of briefs on it?

The Referee: Do you want to fix that next Wednesday?

Mr. McDonnell: Why don't we fix it from the date that the transcript is filed?

The Referee: What time?

Mr. McDonnell: Well, I don't think we ought to try to proceed before the transcript is filed.

The Referee: Next Wednesday we can fix the date. Is that all right?

Mr. Fabian: I think so. I move to strike, your Honor, the testimony of Mr. Rodriguez and Mr. Luken and——

The Referee: Let's handle that this way, take that under submission and cover that on briefs, too. How will that be? I think that is a good motion.

Mr. Utley: I don't think it is. It is not good against the Trustee in any event because he stands in the position of the bankrupt. I think it is tied in with the bank on the idea you might say a bum check was presented to them for the sales price of that car and it was lying in the bank at the time and they certainly were put on notice.

The Referee: Well, that is the question, whether there was sufficient notice. You cover that in your briefs. [81]

* * * * *

[Endorsed]: Filed August 19, 1953.

[Endorsed]: No. 14397. United States Court of Appeals for the Ninth Circuit. Motores de Mexicali, S. A., a corporation, Appellant, vs. Bank of America National Trust and Savings Association and E. A. Lynch, Trustee of the Estate of Erbel, Inc., doing business as Bi-Rite Auto Sales, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 18, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14397

MOTORES DE MEXICALI, S. A.,

Appellant,

vs.

BANK OF AMERICA, N.T. & S.A.,

Appellee.

CONCISE STATEMENT OF POINTS

Appellant Motores de Mexicali, S. A. (hereinafter called Motores) petitioner on review in the District Court from the order of the Referee made and entered on January 27, 1954, respectfully submits the following concise statement of points on which appellant intends to rely:

I.

On the dates set forth in its cross-petition, Motores sold, for cash, and delivered to the bankrupt five automobiles described in said cross-petition, and as a mode of cash payment of the purchase price thereof, the bankrupt issued and delivered to Motores five automobile purchase money drafts referred to in the record as Exhibits A, B, C, D, and E. The automobiles being sold were fully described upon the face of each draft.

Said drafts constituted conditional payment and were signed by the bankrupt, and were payable through the Bank of America National Trust & Savings Association, Wilshire-La Brea Branch. Said drafts were, in due course of banking business, presented at said Bank for payment, and payment thereof was dishonored by the bankrupt and the Bank. The purchase price of said automobiles was at no time paid although said Bank retained said drafts during the entire period it was making the loans to the bankrupt hereinafter mentioned. Said transaction constituted a cash transaction; the delivery of said drafts constituted only a conditional payment of the purchase price; the failure of the bankrupt and the Bank to have said drafts honored and paid upon their presentation in due course of banking business has vitiated the sale transaction ipso facto and ab initio; said drafts were worthless and the purported payment of the purchase price by said worthless drafts was tantamount to payment by counterfeit money in specie.

II.

The provisions of the Negotiable Instruments Act as well as the provisions of the Sales Act must be considered. Therefore, when said drafts were dishonored upon presentation in due course of banking business, there was no sale and the title to said automobiles was thereupon revested in appellant Motores by operation of law.

III.

The appellee Bank of America had knowledge and actual notice, by and through its employees in the collection and loan department, that said purchase drafts were worthless and that title to said automobiles was vested in appellant Motores. Therefore, when the bank floored the automobiles and made the loans to the bankrupt set forth in the Bank's petition for reclamation, it had knowledge of and was charged with actual notice that the automobiles were unpaid for, and that the title to the automobiles was vested in appellant Motores. The Bank was put upon notice and upon inquiry, and the loan advances made by it to the bankrupt set forth in its petition for reclamation were made at its peril. The Bank then was in a position to protect the interests of appellant Motores and at the same time to protect itself in the loaning of the money to the bankrupt by first demanding of the bankrupt that the unpaid drafts then in the possession of the Bank for the purchase price of said automobiles be paid out of the funds loaned by the Bank to the bankrupt.

IV.

The failure of the Bank to have the drafts paid as stated in the preceding specification was an act of negligence on the part of the Bank and Motores was an innocent party within the meaning of Section 3543 of the California Civil Code; said negligent act of the Bank infringed upon the lawful rights of appellant Motores within the meaning of Section 3516 of the Civil Code; appellant Motores should not suffer by said negligent act of the Bank within the meaning of Section 3520 of the Civil Code. Therefore, the Bank is estopped from claiming a lien on the automobiles in question superior to the title of appellant Motores.

V.

Apart from the foregoing, the automobiles in question were obtained by the bankrupt from appellant Motores upon false and fraudulent representations of facts as alleged in the cross-petition of appellant Motores and appellant parted with the possession of said automobiles and delivered the paper muniments of title to the bankrupt relying upon and believing in the truthfulness of said representations and the Bank therefore cannot be said to stand in the position of an innocent purchaser.

VI.

The testimony bearing upon said false and fraudulent representations made by the bankrupt to appellant Motores (though made in the absence of the Bank) was relevant on the issue of the ownership

of the automobiles in appellant Motores and same was binding upon the trustee and the Bank and the Court committed prejudicial error in striking and rejecting said testimony.

VII.

While the Referee and the District Judge on review correctly found and determined that the transaction between the bankrupt and appellant Motores was a cash transaction and that the non-payment of the drafts upon their presentation revested title to said automobiles in appellant Motores, the Referee and the District Judge on review committed prejudicial error in ruling that said transaction was not a cash sale insofar as the appellee Bank of America was concerned.

VIII.

The findings of the Referee as confirmed by the District Judge are not sustained by the record as specifically pointed out in Paragraph VIII of the petition for a review and the specific finding of the Referee (Paragraph 16) that the Bank had no actual knowledge that the bankrupt's drafts were unpaid at the time the Bank made its loans to the bankrupt is clearly refuted by the undisputed evidence in the record.

IX.

Conclusions of Law

That the Court erred in its conclusion of law (No. 1) that Motores is estopped to contend that it has a right to the vehicles or their proceeds superior to that of the Bank.

X.

That the Court erred in failing to make the following conclusions of law:

(a) That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price for said vehicles were all concurrent conditions and mutually dependent acts, and the transaction not only between Motores and the bankrupt but also between Motores and the Bank was a cash transaction.

(b) That the bankrupt's drafts (Exhibits A, B, C, D, and E) constituted only a conditional payment of the purchase price. The failure of the bankrupt to have said drafts honored and paid upon their presentation to the bank for payment has vitiated the sale transaction ipso facto and ab initio, irrespective of the bankrupt's pretended honest intentions when the drafts were issued. The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in specie.

(c) That when a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

(d) That the Bank was not a bona fide purchaser of the vehicles, it stood in the shoes of the bank-

rupt, and the Bank could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the Bank had no lien on the vehicles.

(e) That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an estoppel on the part of Motores against the Bank. That the drafts were deposited by Motores in the regular course of business, that the Bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon revested in Motores. That the flooring financing of the bankrupt contemplated and included the payment of the drafts, and that the flooring financing and the payment of the drafts all constituted a part and parcel of the same transaction, and that the Bank was charged with knowledge thereof.

(f) That the Court erred in not concluding as a matter of law that the Bank was charged with notice and put upon inquiry because of the fact that unpaid drafts were in its possession at the time it advanced money upon its flooring contract agreements.

XI.

That the findings of the Court are contrary to and in conflict with the evidence in the case.

XII.

That the conclusions of law made by the Court are contrary to the law of the case.

XIII.

That the order of the Court granting relief to the Bank is contrary to the law and the evidence.

XIV.

That the Court erred in sustaining objection to certain evidence offered by Motores and in overruling certain objections made to evidence offered by the Bank.

Dated: June 29, 1954.

/s/ ERNEST R. UTLEY,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

The record designated by the appellant Motores de Mexicali, S. A., as material to the consideration of this appeal and to be printed is as follows:

1. Names and addresses of attorneys.
2. Debtor's petition involuntary bankruptcy.
3. Resolution attached to debtor's petition.
4. Order of adjudication.
5. Petition by Bank of America to reclaim property.

6. Notice of motion by Motores for leave to file answer and cross petition.

7. Answer of Motores, affirmative defense and cross petition.

8. Answer by trustee to order to show cause.

9. Stipulation to sell cars and to impound funds.

10. Stipulation to impound funds.

11. Memorandum of opinion by Referee.

12. Objection by Motores to proposed findings.

13. Findings of fact and conclusions of law.

14. Petition by Motores for review of Referee's order.

15. Certificate by Referee on review.

16. Notice of motion by Bank of America to dismiss petition on review.

17. Minute order of March 22, 1954.

18. Order denying petition for review.

19. Notice of appeal.

20. Transcript of testimony, beginning with line 17 at page 13 up to and including line 23, page 81.

21. Concise statement of points herewith filed.

22. This designation.

Dated: June 29, 1954.

/s/ ERNEST R. UTLEY,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1954. Paul P. O'Brien,
Clerk.

